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# A SHORT HISTORY OF HEARSAY REFORM, WITH PARTICULAR REFERENCE TO *HOFFMAN V. PALMER*, EDDIE MORGAN AND JERRY FRANK

MICHAEL ARIENS\*

"Few historians, however, hold themselves out as fictionists."

Jerome Frank, *The Place of the Expert in a Democratic Society*<sup>1</sup>

True, no man can be wholly apart from his fellows. But, if each of us is a promontory, yet the promontory reaches out beyond the social mainland to a point where others cannot intrude. . . . It is a no-other-man's land, for others can't penetrate it, can't communicate with it.

Jerome Frank, *Judge Learned Hand*<sup>2</sup>

## INTRODUCTION

On my summer vacation, I chanced upon the novel *Foe* by the South African writer J.M. Coetzee.<sup>3</sup> *Foe* is a modern reworking of Daniel Defoe's *Robinson Crusoe*. In this modern retelling, Coetzee presents the story of the relation of author and subject, not the story of the adventures of a shipwrecked Englishman. In *Foe*, the authorial voice is that of Susan Barton, a castaway who ended up on the same island as Cruso and Friday. She, Cruso and Friday are "rescued" and taken by ship to England. En route, Cruso dies. Once in London, Susan Barton takes her story of Cruso and Friday to Daniel Foe, and finds that his interest is more in the story of her life and less in the story of Cruso's adventures. Foe, chased by creditors, flees his house, into which Barton and Friday move. Barton later leaves, searching for Foe, whom she finally tracks down. Confronting Foe, she says, "I am not a story, Mr. Foe."<sup>4</sup> Then, after embracing a young woman who also calls herself Susan Barton and claims to be her daughter, a claim denied by our narrator, she continues:

In the beginning I thought I would tell you the story of the island and, being done with that, return to my former life. But now all my life grows to be story and there is nothing of my own left to me. I thought I was myself and this girl a creature from another order speaking words you made up for her. But now I am full of doubt. Nothing is left to me but doubt. I am doubt itself. Who is speaking me? Am I a phantom too? To what order do I belong? And you: who are you?<sup>5</sup>

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1. Jerome Frank, *The Place of the Expert in a Democratic Society*, reprinted in *A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK* 31 (Barbara Frank Kristein ed., 1965).

2. Jerome Frank, *Judge Learned Hand*, reprinted in *A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK* 49 (Barbara Frank Kristein ed., 1965).

3. J.M. COETZEE, *FOE* (1987).

4. *Id.* at 131.

5. *Id.* at 133.

My story is about the history of hearsay (and, more broadly, evidentiary) reform. My story more particularly is about a case involving two major figures in American law. For evidence scholars, the case of *Palmer v. Hoffman*<sup>6</sup> represents one of a few cases concerning hearsay known by name.<sup>7</sup> The two major figures are Jerome N. Frank and Edmund M. Morgan, Jr., whose stories I have both appropriated, and, I hope, treated with honor and respect.

Jerome Frank remains well known in legal academia as a symbol of American legal realism during the interwar years. His 1930 book, *Law and the Modern Mind*,<sup>8</sup> became one of the foremost works of legal realism. Frank's work and influence in American law and legal thought has been the subject of several books,<sup>9</sup> and his influence on American legal thought is a prominent feature of recent works on the history of American law.<sup>10</sup> In contrast, although Morgan was an important figure in the history of legal reform and the professionalization of legal education, he is remembered today only by evidence and procedure scholars.<sup>11</sup> Even here, his influence has been undervalued.<sup>12</sup>

6. 318 U.S. 109 (1943), *aff'g* *Hoffman v. Palmer*, 129 F.2d 976 (2d Cir. 1942). Because the plaintiff Hoffman was successful in the Second Circuit, the defendant Palmer, a trustee of the railroad, was the petitioner before the Supreme Court and thus the first named party. My interest, however, is in the Second Circuit decision, not the decision of the Supreme Court.

7. Others include the English case of *Wright v. Doe d. Tatham*, 7 Ad. & E. 313, 112 Eng. Rep. 488 (1837) (defining hearsay in broad terms, thus extending the reach of the rule); *Shepard v. United States*, 290 U.S. 96 (1933) (holding inadmissible as a dying declaration a statement by defendant's deceased wife shortly before she died that "Dr. Shepard has poisoned me."); *Donnelly v. United States*, 228 U.S. 243 (1913) (holding inadmissible to prove defendant's innocence to murder charge a confession by another, deceased at the time of trial); and *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892) (holding admissible as exception to hearsay rule letter written by Adolph Walters concerning his future travel plans with plaintiff's allegedly deceased husband to show Walters, and not plaintiff's husband, was the decedent).

8. JEROME FRANK, *LAW AND THE MODERN MIND* (1930). This book went through 6 printings by 1948, and in 1985 was reprinted in the Legal Classics series.

9. JULIUS PAUL, *THE LEGAL REALISM OF JEROME N. FRANK* (1959); J. MITCHELL ROSENBERG, *JEROME FRANK: JURIST AND PHILOSOPHER* (1970); WALTER E. VOLKOMER, *THE PASSIONATE LIBERAL: THE POLITICAL AND LEGAL IDEAS OF JEROME FRANK* (1970); ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985). Interestingly, none of these works is a biography. Although the milestones of Frank's life are briefly noted, it is Frank's work that is analyzed, not his life. This is somewhat surprising given Frank's view of the importance of understanding a judge's personality in order to understand the legal process. A collection of Frank's writings is *A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK* (Barbara Frank Kristein ed., 1965). A bibliography of articles about and memorial tributes to Jerome Frank is found in MARVIN SCHICK, *LEARNED HAND'S COURT* 362-63 (1970). See also J. Mitchell Rosenberg, *Frank, Jerome*, in *DICTIONARY OF AMERICAN BIOGRAPHY* 1956-60, at 215 (John A. Garraty ed., Supp. VI 1980).

10. BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 482-91 (1993); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960* at 175-79 (1992). See generally KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 270-71 (1989); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 688, 692 (2d ed. 1985). See also Neil Duxbury, *Jerome Frank and the Legacy of Realism*, 18 J.L. & SOC'Y 175 (1991).

11. One example of the fact that Morgan is undeservedly forgotten is the absence of an entry on Morgan

The issue in the case of *Hoffman v. Palmer* was relatively simple: In a case involving a collision between a car and a train, was the defendant railroad permitted to introduce into evidence the transcript of a question and answer session made two days after the accident between the engineer of the train and another employee of the railroad? If believed, this statement exonerated the railroad from liability. Although a federal statute<sup>13</sup> enacted in 1936 appeared to permit (and maybe even require) the trial court to admit the statement, the court excluded the statement. On appeal, writing for a divided court, Judge Jerome Frank held that the statute implicitly required the absence of a motive to lie on the part of the declarant (the railroad engineer who gave the statement) in order for the statement to be admissible. His opinion was unanimously affirmed by the Supreme Court in an opinion written by Justice William O. Douglas.<sup>14</sup> Morgan vehemently disagreed with both Frank and Douglas's opinions. *Hoffman v. Palmer* is emblematic of the history of the American law of evidence, of law reform, and, because of the people involved, of the history of twentieth century American legal thought.

### I. THE IDEA OF HEARSAY REFORM

Much of the history of the American law of evidence, including its most contentious (and difficult) issue, hearsay, is the story of stasis and reform. In 1810, the first compiler of the American law of evidence, Zephaniah Swift, wrote:

For a long time, the rules of evidence were uncertain, and contradictory, and in some instances, were not adapted to the discovery of truth. But, by a course of modern decisions, founded on the most liberal principles of policy, they are reduced to a precision, and certainty, susceptible of little further improvement,

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in the *Dictionary of American Biography*. A second example is the absence of Morgan's name from any of the four books cited in *supra* note 10.

12. I have written a history of the codification of the American law of evidence in which Morgan plays a central role. Michael Arians, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC INQ. 213 (1992). Although I am indebted to his excellent work, I am convinced that a prominent historian of evidence, William Twining, has marginalized Morgan's role in his study of the "Anglo-American" history of evidence. See generally WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985).

13. 28 U.S.C. § 695 (1936):

Admissibility. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

14. 318 U.S. 109 (1943).

and may now be considered as placed on a basis, that will endure as long as truth and justice shall be revered.<sup>15</sup>

Thirty years later, Harvard Law School Professor Simon Greenleaf<sup>16</sup> published the first volume of his three-volume *Treatise on the Law of Evidence*. At the close of this volume, Greenleaf wrote:

The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor from the manner of treatment; and will rise from the study of its principles, convinced, with Lord Erskine, that "they are founded in the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life."<sup>17</sup>

Of this first major American evidence treatise, Charles Sumner wrote, "[Greenleaf's] aim has been to expound the law as it is, and not to enter into the entangled discussion of the various questions of its reform."<sup>18</sup> One area in which "the law as it is" was not to be disturbed was hearsay. In Greenleaf's view, "considerations of public interest and convenience" "are considerations of too grave a character to be overlooked by the court or the legislature" to change the rule.<sup>19</sup> Possibly because this work attempted merely to "expound the law as it is," Greenleaf's *Treatise* was enormously successful, going through sixteen editions, the last published in 1899 under the partial editorship of John Henry Wigmore.

The most prominent proponent of evidentiary reform during the antebellum era was John Appleton,<sup>20</sup> later a Supreme Court justice in the state of Maine. Appleton's essays, most of which were written in the 1830s, roundly criticized the rules of evidence for hampering the search for the truth. When Appleton's articles were collected and printed in book form in 1860,<sup>21</sup> he claimed in the *Preface* that rules of evidence designed to protect themselves by "knaves and criminals great and small" could not "have materially improved upon the existent law."<sup>22</sup> Among the rules of greatest concern to Appleton were

15. ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES x (1810 Arno repr. 1972).

16. On Greenleaf, see H.W. Howard Knott, *Greenleaf, Simon*, in 7 DICTIONARY OF AMERICAN BIOGRAPHY 583 (Allen Johnson & Dumas Malone eds., 1931); Charles Warren, 1 HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 480-543 (1908); 2 *id.* at 1-46; THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 at 215-19 (1918). Professor Alfred Konefsky is writing a biography of Greenleaf.

17. SIMON GREENLEAF, 1 A TREATISE ON THE LAW OF EVIDENCE § 584 (1842) (footnote omitted).

18. Charles Sumner, *Greenleaf on Evidence*, 27 AM. JURIST & L. MAG. 379, 388 (July 1842).

19. GREENLEAF, *supra* note 17, at § 124.

20. On Appleton, see DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM (1990), a study of Appleton's work. A fond personal reminiscence by Charles Hamlin is found in *John Appleton*, 5 GREAT AMERICAN LAWYERS 41 (William Draper Lewis ed., 1908). See also Robert Hale, *Appleton, John*, in 1 DICTIONARY OF AMERICAN BIOGRAPHY 328 (Allen Johnson ed., 1928).

21. JOHN APPLETON, THE RULES OF EVIDENCE STATED AND DISCUSSED (1860).

22. *Id.* at 9-10.

the rules excluding as incompetent witnesses interested parties and atheists.<sup>23</sup> Also of concern were the rules protecting privileged communications.<sup>24</sup> Appleton later turned to the rules regulating hearsay.<sup>25</sup> In an article titled *Hearsay Evidence*, Appleton made a case for the admission of hearsay evidence if the declarant was dead.<sup>26</sup> Although hearsay is "an inferior species of evidence," "when the witness is dead, his declarations in whatsoever form attainable should be received."<sup>27</sup> After Appleton's essays were reprinted in book form, two of the handful of reviews, while praising the work, deemed some of Appleton's proposed reforms "radical."<sup>28</sup>

Both Appleton and defenders of the rules of evidence in nineteenth century America believed the goal of the rules was to produce the truth. At his retirement dinner in 1883, Appleton stated his view of the role of the judge:

He should seek for the truth. He should present facts as they exist. . . . [H]e would be derelict of his duty if he omitted to clearly state to them the evidence and its bearings on the rights of parties--thus aiding the jury in arriving at the truth. One side of every litigation is in the right and the other in the wrong.<sup>29</sup>

Whether one accepted or disparaged the current state of the law of evidence, the rules of evidence were based on the premise that the trier of fact (usually a jury) was to hear evidence which allowed it to determine what really happened.

In 1898, Harvard Law School Professor James Bradley Thayer's book, *A Preliminary Treatise on the Law of Evidence*, was published. In his *Treatise*, Thayer preached that because of the manner in which the rules of evidence were created and developed, "there has resulted plenty of confusion."<sup>30</sup> The "greatest obstacle to be overcome"<sup>31</sup> in the

23. John Appleton, *Incompetency of Parties as Witnesses at Common Law*, 8 AM. JURIST & L. MAG. 5 (July 1832); John Appleton, *Incompetency of Witnesses from Interest*, 6 AM. JURIST & L. MAG. 18 (July 1831); John Appleton, *Incompetency of Witnesses from Infamy of Character*, 5 AM. JURIST & L. MAG. 101 (Jan. 1831); John Appleton, *Of Incompetency of Witnesses on account of Religious Opinion*, 4 AM. JURIST & L. MAG. 286 (Oct. 1830).

24. John Appleton, *Attorney and Client*, 17 AM. JURIST & L. MAG. 304 (July 1837); John Appleton, *The Admission of Husband and Wife*, 15 AM. JURIST & L. MAG. 274 (July 1836).

25. John Appleton, *Hearsay Evidence and Confessions or Admissions of the Party*, 20 AM. JURIST & L. MAG. 68 (Oct. 1838); John Appleton, *Hearsay Evidence*, 24 AM. JURIST & L. MAG. 118 (Oct. 1840) [hereinafter "*Hearsay Evidence*"].

26. *Hearsay Evidence*, *supra* note 25.

27. *Hearsay Evidence*, *supra* note 25, at 120-21.

28. *Review of Current Literature*, 70 CHRISTIAN EXAM. 150, 151-52 (Jan. 1861) ("Judge Appleton rests his argument on the very startling and radical proposition—which the reader will find assumed on every page—that *the object of evidence is to get at facts . . .*"); 24 MONTHLY L. RPTR. 450 (May 1862) ("While there are now, probably, few persons who would assent to all of his conclusions—some of which are, in a legal sense, extremely radical . . .").

29. Hamlin, *supra* note 20, at 77 (quoting retirement speech of Chief Justice John Appleton).

30. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE* 4 (1898). On Thayer, see Samuel Williston, *Thayer, James Bradley*, in 18 DICTIONARY OF AMERICAN BIOGRAPHY 405 (Dumas Malone ed., 1936); James Parker Hall, *James Bradley Thayer*, in 8 GREAT AMERICAN LAWYERS 343 (William Draper Lewis ed., 1909); *James Bradley Thayer*, 15 HARV. L. REV. 599 (1902). See also Jay Hook,

reform of the law of evidence were lawyers. However, by emulating the statutory reform of civil procedure in Massachusetts, legislative reform of the law of evidence was possible.<sup>32</sup> If the law of evidence were to be reformed, the result should be that "[w]e should have a system of evidence simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied."<sup>33</sup>

Thayer briefly considered the problem of hearsay in the final chapter of the *Treatise*. For Thayer, "[a] true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible."<sup>34</sup> In 1898, the Massachusetts legislature, at Thayer's behest, passed an act barring hearsay objections to declarations made by a "deceased person" "if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."<sup>35</sup>

Then, in 1904-05, Thayer's former student and friend, John Henry Wigmore, published his four-volume *Treatise on Evidence*.<sup>36</sup> Wigmore's work was one of conservative reform. "That our law of Evidence can be improved upon, no one doubts. That the improvement must be gradual, yet unremitting, is equally certain . . ."<sup>37</sup> Like

*A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1 (1993). Hook is currently working on a biography of Thayer.

31. THAYER, *supra* note 30, at 532.

32. THAYER, *supra* note 30, at 532-533. Thayer approvingly judged this reform as "a careful but radical change." THAYER, *supra* note 30, at 533.

33. THAYER, *supra* note 30, at 529.

34. THAYER, *supra* note 30, at 522.

35. 1898 Mass. Acts ch. 535:

No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.

This act was later amended to read:

A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

MASS. GEN. L. ch. 233, § 65 (Mass Ter. ed. 1932).

John Appleton suggested a similar revision of the rule against hearsay in his 1840 article. See *Hearsay Evidence*, *supra* note 25, at 120-21.

36. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (4 vols. 1904-05) [hereinafter TREATISE I]. On Wigmore, see WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977); Stephen Botein, *Wigmore, John Henry*, in DICTIONARY OF AMERICAN BIOGRAPHY 1941-45 at 820 (Edward T. James ed., Supp. III 1973); *John Henry Wigmore*, 38 ILL. L. REV. 1 (1943); *John Henry Wigmore: A Centennial Tribute*, 58 NW. U. L. REV. 443 (1963).

37. I TREATISE, *supra* note 36 at xii. See also JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW at § 8c (2d ed. 1923) [hereinafter TREATISE II]. ("Our system of evidence is sound on the whole."). Wigmore seemed pained by the accusation that "the rules of Evidence, over and above all others have come to bear, even within the profession itself, the stigma of technical arbitrariness and obstructive unreason." TREATISE I, *supra* note 36, at vii-viii. For Wigmore, this was not true: "The rules of Evidence, as recorded in our law, may be said to be essentially rational." TREATISE I, *supra* note 36, at viii.

Appleton's earlier effort for evidentiary reform, Wigmore's *Treatise* focused on the relation between the rules of evidence and the search for the truth. "What the law of Evidence, and of Procedure, nowadays most needs is that the men who are our judges and our lawyers shall firmly dispose themselves to get at the truth and the merits of the case before them."<sup>38</sup> Unlike Appleton, Wigmore noted that this relation was hampered by the professional inclination to appeal evidentiary issues rulings on evidence. "The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency."<sup>39</sup> By 1908, however, Wigmore had concluded that only the opinion rule, which barred witnesses other than experts from testifying to "opinions" instead of "facts," was "radically discreditable."<sup>40</sup>

For evidence progressives like Thayer and Wigmore, the prospect of reform faced several hurdles. Although the era of the great court lawyer as symbol of the lawyer as professional was coming to a close by the beginning of the twentieth century, the era's ethos of the sporting theory of justice predominated.<sup>41</sup> Progressives also believed reform efforts were blocked by incompetent and often corrupt state legislatures and local trial judges.

Until his death in 1943, Wigmore was the brooding omnipresence of the law of evidence. Any effort to reform the law of evidence needed to pass Wigmore's muster if it were to have any chance of judicial or legislative acceptance. Even with his blessing, prospects for reforming the law of evidence were severely limited by professional inertia and complacency.

The first major effort to reform the law of evidence began in 1920. A Legal Research Committee sponsored by the Commonwealth Fund appointed a Committee to Propose Specific Reforms in the Law of Evidence. The chairman of the Evidence Committee was Edmund M. Morgan, then a professor at Yale Law School. The report was finally published in 1927, and did not propose a model code of evidence, because, according to the Committee, "[o]ur system of evidence is sound on the whole."<sup>42</sup> Instead, the

38. WIGMORE, CODE OF EVIDENCE at *xiii* (2d ed. 1935).

39. 1 TREATISE I, *supra* note 36, at § 8. Wigmore was echoing a comment made by Thayer in his *Treatise*: "In our own administration of the law of evidence too many abuses are allowed, and the power of the courts is far too little exercised in controlling the eager lawyer in his endeavors to press to an extreme the application of the rules." The result was that the American judicial process tended "thus to foster delay and chicane." THAYER, *supra* note 30 at 528-29. Two years after Wigmore's book was published, Roscoe Pound, then Dean at the University of Nebraska Law School, excoriated the profession at the annual meeting of the American Bar Association for its attachment to the "sporting theory of justice." Roscoe Pound, *The Causes of Popular Dissatisfaction in the Administration of Justice*, 29 A.B.A. REP. 395, 405 (1906), and cited Wigmore for the proposition that this view inaccurately depicted the adversary system. The next year Wigmore hired Pound to teach at Northwestern. He also returned the favor, approvingly citing Pound's speech as "diagnosing" the causes of the defects of American procedural law, including the law of evidence. WIGMORE, SUPP. TO TREATISE vii (1908).

40. WIGMORE, SUPP. TO TREATISE vi.

41. I have discussed this change in the professional elite in Michael Arians, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1103 (1994). See also *supra* note 39.

42. EDMUND M. MORGAN, ET AL., THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM *xii* n.1



Committee's report contained five specific proposals, including two proposals to admit statements otherwise excluded by the rule barring hearsay evidence. The first permitted the introduction of a hearsay statement if made by a person who died before the trial. This reform proposal was based on a Massachusetts law enacted in 1898.<sup>43</sup> The second was a proposal to liberalize the admission of business records, otherwise classified as hearsay statements.<sup>44</sup>

This latter proposal was enacted the next year in New York.<sup>45</sup> In 1930, in *Johnson v. Lutz*,<sup>46</sup> the New York Court of Appeals concluded that a police report of an accident, which included statements made to the officer by bystanders, who may not have had personal knowledge of the accident, was not within the operation of the Act because those bystanders were under no duty to make any statement to the officer. On June 20, 1936, based on a four-page report from the Senate Judiciary Committee<sup>47</sup> and without any recorded debate, Congress passed the Commonwealth Fund Evidence Committee's proposal concerning business records.<sup>48</sup>

Two additional evidentiary reform efforts were undertaken in the 1930s. The first was an effort led by Wigmore under the auspices of the American Bar Association.<sup>49</sup> Among the twenty specific proposals made by the ABA Committee on Improvements in the Law of Evidence was a proposal to amend the common law rule concerning the admissibility of business records as an exception to the hearsay rule.<sup>50</sup> Additionally, the Committee recommended adoption of the "Massachusetts" rule permitting the introduction of hearsay statements made by persons who had died by the time of the trial, as long as the statements were made in good faith before the controversy arose.<sup>51</sup> However, the Committee noted "a probable lack of united professional support for any radical, or even any substantial changes."<sup>52</sup>

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(1927). This language constituted Wigmore's opinion, and was actually taken from a statement of his in his *Treatise*. See TREATISE II, *supra* note 37, at § 8c.

43. MORGAN, *supra* note 42, at 37-49.

44. MORGAN, *supra* note 42, at 51-63.

45. 1928 N.Y. Laws, ch. 532. This law was codified as § 374-a of the Civil Practice Code of New York.

46. 170 N.E. 517 (N.Y. 1930).

47. SENATE JUDICIARY COMMITTEE REPORT, ADMISSIBILITY IN EVIDENCE OF CERTAIN WRITINGS AND RECORDS, 74th Cong., 2d Sess., Rep. No. 1965, April 24, 1936 [hereinafter COMMITTEE REPORT].

48. 28 U.S.C. § 695.

49. *Report of the Committee on Improvements in the Law of Evidence*, 63 A.B.A. REP. 570 (1938) [hereinafter *Report*].

50. *Id.* at 582-83. This was the second of twenty proposals offered. The Committee preferred the adoption of the Uniform Laws Conference Draft of 1936, because it was an "improvement" of the language used in the Commonwealth Fund reform proposal, but recommended both proposals, as well as a third proposal by a Northwestern University Law School student, Roscoe L. Barrow, in a 1937 article. See Roscoe L. Barrow, Comment, *Business Entries Before the Court*, 32 ILL. L. REV. 334 (1937).

51. *Report*, *supra* note 49, at 584-85.

52. *Report*, *supra* note 49, at 570.

The second and most thorough effort to reform the law of evidence was the American Law Institute's Model Code of Evidence.<sup>53</sup> The Institute's reporter was Morgan, whose reputation in the field of evidence was second only to Wigmore's. Unlike Wigmore, Morgan was not content to draft a code embracing incremental reform. In the first of four articles published in the American Bar Association Journal concerning the Model Code of Evidence, Morgan declared, "It is time, too, for the radical reformation of the law of evidence."<sup>54</sup> Much of the radical reformation of the law of evidence consisted in giving greater discretion to trial judges to admit or exclude evidence. In Morgan's view, however, the most "radical" provision concerned reform of hearsay.<sup>55</sup> The Code specifically proposed the adoption of a broad hearsay exception for business records<sup>56</sup> and an exception admitting hearsay statements made by persons no longer alive at the time of trial.<sup>57</sup> At the same time the American Law Institute formally approved the Model Code of Evidence,<sup>58</sup> Judge Jerome Frank was authoring an opinion that would assist in halting the efforts to promote evidentiary reform.

## II. THE ORIGINS OF *HOFFMAN V. PALMER*

On Christmas Day, 1940, at about 3:15 p.m., newlyweds<sup>59</sup> Howard Hoffman, a twenty-four-year old graduate of Rensselaer Polytechnic Institute (RPI) and recently employed construction engineer, and his twenty-three-year old wife Inez T. Spraker Hoffman, a Vassar graduate, began their trip back home to Hartford, Connecticut from the home of Inez's parents in Cooperstown, New York. On Route 41 in West Stockbridge, Massachusetts, at about 6:10 p.m., on a "dark, pitch black"<sup>60</sup> yet "clear"<sup>61</sup> night, a Ford coupe, driven by Howard, collided with a train of the New York, New Haven, and

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53. MODEL CODE OF EVIDENCE (1942).

54. Edmund M. Morgan, Jr., *The Code of Evidence Proposed by the American Law Institute*, 27 A.B.A. J. 539, 540 (Sept. 1941). This was the first of four consecutively published articles with the same title. See also Edmund M. Morgan, *Foreward to MODEL CODE OF EVIDENCE* 6 (1942).

55. See Morgan, *Code of Evidence*, *supra* note 54, at 595 ("Consequently it is in the chapter on Hearsay that the code departs most widely from the common law."); Charles T. McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEX. L. REV. 661, 671 (1942) ("The draftsman [Morgan] describes Rule 503 as the most radical departure from the common law in the whole Code.") (footnote omitted).

56. MODEL CODE OF EVIDENCE Rule 514.

57. MODEL CODE OF EVIDENCE Rule 503(a).

58. 19 A.L.I. PROC. 74, 257 (1942).

59. According to the complaint, the Hoffmans were married on August 10, 1940. *Hoffman v. Palmer*, Record at 12; Complaint at 9 [hereinafter Record] (on file with author). This, along with the following statements of Howard Hoffman's testimony and the testimony of the other witnesses, is taken from the record filed in *Hoffman v. Palmer*, United States Court of Appeals for the Second Circuit and from the Brief for Plaintiff-Appellee and Brief for Appellants (on file with author). The original record of the case is retained at the National Archives-Northeast Region, and a printed *Transcript of Record* to the Supreme Court (*Palmer v. Hoffman*, No. 300, October Term 1942) is also available on microfiche.

60. Brief for Plaintiff-Appellee at 3; Record, *supra* note 59, at 49 (testimony of Howard Hoffman that it was "pitch black" at the time of the accident).

61. Record, *supra* note 59, at 215 (testimony of Norma Mary Gennari); Brief for Appellants at 4.

Hartford Railroad Company. Inez died, and Howard was "severely and permanently"<sup>62</sup> injured.

Howard Hoffman filed suit in the United States District Court for the Eastern District of New York, claiming residence in "the Borough of Brooklyn, County of Kings, City and State of New York."<sup>63</sup> The railroad was incorporated in Connecticut, and maintained its principal office in New Haven, which created diversity of citizenship between the parties.<sup>64</sup> Because the railroad was bankrupt and undergoing reorganization in federal district court in Connecticut, Hoffman obtained permission to file suit against Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, all trustees of the Railroad.<sup>65</sup> Hoffman alleged on his own behalf and as administrator for the estate of his wife that the railroad violated its statutory duty of care under Massachusetts law as well as its common law duty of care.<sup>66</sup>

Hoffman testified that he came to a stop fifteen to twenty feet from the Elkey-Buckley railroad crossing, looked both ways, and saw no light and heard no bell. He then started up in first gear, travelling between three and five miles per hour as he approached the grade crossing. As he was just about over the near rail, he saw a dark mass closely approaching from his left. He still saw no light. The next thing he knew, he was a patient at the Pittsfield, Massachusetts hospital.<sup>67</sup> To prove that no light was at the head of the train and that no warning sound by bell or whistle was made, Hoffman's counsel called several other witnesses. A car driven by Laurence Bona and including as passengers his wife Lillian and his siblings Arthur and Edna was on Route 41 travelling the opposite direction from the Hoffmans. Because they had seen "a" train go by three-fourths of a mile southeast of the crossing where the accident took place, the Bonas all testified that they knew a train might be coming. They heard no bells or whistles as they approached the crossing. Arthur heard a crash and Laurence was the first person to reach the Hoffmans after the accident. The other witness for the plaintiff, Norma Gennari, testified

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62. According to the complaint, his injuries included "a compound comminuted fracture of the right leg[,] . . . comminuted fracture of the left femur," several lacerations on his head and face, a concussion and a two inch puncture of the right femur. Record, *supra* note 59, at 6; Complaint at 3. In testimony, Hoffman stated that he remained in the hospital from the time of the accident until the end of May 1942, a six month period. Record, *supra* note 59, at 56-58.

63. Record, *supra* note 59, at 4; Complaint at 4. At the trial, Hoffman stated that he was temporarily residing in Troy, New York, taking graduate engineering classes at RPI, but continued to claim permanent residence in Brooklyn. Records at the Alumni Office at RPI indicate that Hoffman never received a master's degree. Hoffman died on May 18, 1982.

64. Record, *supra* note 59, at 19; Answer at 1. If Hoffman had continued to maintain his residence in Hartford, as it was before the accident, the case could not have been filed in federal court.

65. For simplicity's sake, I will refer to defendants as "the railroad."

66. That civil cases are resolved much more slowly today than in the past is indicated by the speed with which this case was concluded. Suit was filed on July 17, 1941, and final judgment was rendered on November 25, 1941. The opinion of the United States Court of Appeals for the Second Circuit was released on June 23, 1942 (an amended opinion was released on July 31, 1942), and the Supreme Court decided the case on February 1, 1943. If you're counting, that means that the entire case, from filing to judgment by the Supreme Court, took just slightly more than 18 months.

67. Record, *supra* note 59, at 49-55.

that as she walked home that evening, about 600 feet from the site of the accident, she heard no whistle or bell, but did hear the crash.

The train, consisting of an engine with a tender and a caboose, was backing up. The caboose was attached to the nose of the engine. Thus, the tender of the engine was the "front" of the train, and was the first part of the train to cross the Elkey-Buckley intersection.

The Railroad claimed its agents acted with due care and asserted that Hoffman was contributorily negligent. To prove a whistle blew and a bell sounded, the defense offered the testimony of the conductor, a brakeman and flagman riding in the caboose, the sister and brother of the conductor, and five other witnesses.<sup>68</sup> The defense also offered the testimony of Harry Meach, the fireman, who testified he saw the Hoffman's car approach the crossing, slow down about eighteen to twenty feet from the crossing, and then speed up as the head of the tender arrived at the crossing.<sup>69</sup> Meach did not see the tender hit the car, turning his head "so that I couldn't see what happened when we got by. I didn't care to witness it, in other words."<sup>70</sup> Additionally, Norma Gennari testified that the coupe was travelling between thirty and thirty-five miles per hour when it disappeared from her view. The defendant noted that the point at which the coupe would have disappeared from Norma Gennari's view was between twenty and seventy feet from the railroad track.<sup>71</sup> The Railroad also offered testimony regarding inconsistent statements made by the Bonas and Norma Gennari that cast doubt on whether they had not heard a whistle or bell,<sup>72</sup> as well as a statement by Laurence Bona in which he described his encounter with Hoffman in the hospital after the accident. Bona claimed that "[Hoffman] said he stopped for the crossing and what he saw was the back of the train. He thought the train was gone by and he started up and it hit him and that is all he could remember. He was in tough shape."<sup>73</sup> At trial, Bona denied making this statement.<sup>74</sup>

The Railroad argued that Hoffman had mistakenly believed the "front" of the train, that is, the tender, was actually the "end" of the train. The mistake led him to think the train had crossed the intersection when it had actually just entered the intersection. The jury evidently disagreed with the Railroad's theory of the case, finding for the plaintiff in both his individual and administrative capacities.<sup>75</sup> On November 25, 1941, an order was entered granting judgment to Howard Hoffman in the amount of \$25,077.35 and to him

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68. See generally Record, *supra* note 59, at 263-421. Two of those witnesses, the engineer's widow Bertha McDermott, and her son's friend, Francis James Hoerman, testified more about the engineer's actions before coming upon the Elkey-Buckley intersection than what happened as the train approached the intersection. A sixth defense witness, fifteen-year old Amenio Selva, testified that he saw a light but heard no whistle from his vantage point about 1500 feet from the crossing. Record, *supra* note 59, at 396-400.

69. See Record, *supra* note 59, at 329-53.

70. Record, *supra* note 59, at 339.

71. Brief for Appellants, *supra* note 59, at 7.

72. Record, *supra* note 59, at 373-80; 409-10.

73. Record, *supra* note 59, at 376 (testimony of stenographer Henry R. Hunt).

74. Record, *supra* note 59, at 116-17.

75. Record, *supra* note 59, at 441.

as the Administrator of the estate of Inez in the amount of \$9000.<sup>76</sup> The Railroad appealed.

On appeal, the Railroad listed four errors. One claimed error was placing the burden of proof of contributory negligence on the defendant. The other three claimed errors were evidentiary. In order, the claimed errors included: (1) the refusal of the trial court to permit the testimony, on direct examination, of the observations of a defense witness concerning the line of sight at the Elkey-Buckley crossing; (2) the exclusion of an interview of the engineer of the train, Harold McDermott, who died before the trial, by J.W. Cuineen,<sup>77</sup> Assistant Superintendent of the Railroad, which occurred in the presence of E.J. Conley of the Legal Department of the Railroad, W.E. Christie of the Massachusetts Public Utilities Commission<sup>78</sup> and S. Byrne, lieutenant of railroad police; and (3) the court's ruling permitting the plaintiff to introduce in evidence a written statement given by Laurence Bona to Hoffman's lawyer if defense counsel requested to see the statement.

The Railroad's brief consisted of twenty-one printed pages, of which thirteen were dedicated to the four claims of error. On the issue that made this case famous, the exclusion of the engineer's statement, the Railroad used less than two pages to make its argument.<sup>79</sup> While acknowledging the finality of the jury's verdict on disputed issues of fact, the attention given to the facts by the appellant was apparently designed to highlight the claimed error concerning burden of proof on the issue of contributory negligence.<sup>80</sup>

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76. As evidence that the award in favor of Howard Hoffman was a substantial verdict for the era, note that seven years after the verdict, in 1948, in the first volume of the NACCA Law Journal, a publication of the National Association of Claimants' Compensation Attorneys, included was a section titled "Verdicts or Awards exceeding \$50,000." See 1 NACCA L.J. 99 (1948). After detailing several verdicts, the two page section concluded with, "NACCA is interested in reporting large verdicts or compensation awards because of their manifest interest to members of the bar. Please report those in excess of \$50,000 . . . ." *Id.* at 100. Under Massachusetts wrongful death law, see MASS. GEN. L. ch. 229 § 3 (Ter. ed. 1932), the measure of damages was "not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability" of the Railroad, so the award to the estate of Inez Hoffman was nearly the maximum allowed by law.

77. In the Brief for Plaintiff-Appellee, Cuineen's name is spelled "Cuneen." Brief for Plaintiff-Appellee, *supra* note 59, at 9.

78. After Cuineen finished questioning McDermott, Christie asked three questions of the engineer. See *infra* note 117.

79. The "argument" consisted of a quotation of the statute, an indented citation to three Second Circuit cases interpreting the statute, and a conclusory statement that, "A reading of engineer McDermott's statement shows its relevancy and materiality on all the issues of negligence submitted to the jury-headlight, whistle, and bell." Brief for Appellants, *supra* note 59, at 14.

80. At the close of its discussion of the facts, the brief for appellant concluded, "Naturally the trial court said it could not substitute its opinion for the opinion of the jury. Burden of proof as to contributory negligence became a very practical consideration. We shall discuss other aspects of the evidence under the appropriate law points." Brief for Appellants, *supra* note 59, at 7. Hoffman claimed that the Railroad violated both Massachusetts statutory law as well as the common law. The possibly differing bases of these claims raised problems under the rule in the then recently decided case of *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). The emphasis on the issue of burden of proof was in part a consequence of the Supreme Court's decision in *Klaxon*

In response, the plaintiff's brief was largely occupied with the issue of the burden of proof of contributory negligence. More than eight pages of this twenty page brief were dedicated to that issue, and less than one-and-a-half pages discussed the exclusion of the business records.<sup>81</sup> Appellant's reply brief discussed only the issue of the allocation of the burden of proof of the issue of contributory negligence.<sup>82</sup>

The reply brief for the appellant railroad was filed with the Second Circuit clerk on May 11, 1942.<sup>83</sup> The court's decision was first released on June 23, 1942. An amended opinion dated July 31, 1942 was published in the West Federal Reporter.<sup>84</sup>

### III. THE CAST OF CHARACTERS

The case of *Hoffman v. Palmer* was heard before a panel consisting of Thomas W. Swan,<sup>85</sup> Charles E. Clark,<sup>86</sup> and Jerome N. Frank. Both Swan and Clark had formerly held the position of Dean at Yale Law School. Swan was Dean from 1916 through 1926, when he was appointed to the court. Swan was conservative in an age that equated liberal with progressive, had married into wealth, yet was considered "a first-rate professional"<sup>87</sup> whose work as Dean had made Yale Law School a better and more progressive school. Swan remained on the bench until the late 1950s, and was noted for his work in commercial law.<sup>88</sup>

Swan appointed Clark to the Yale Law School faculty in 1919. Ten years later, Clark was appointed Dean, after the whirlwind deanship of Robert M. Hutchins, and remained Dean until 1939, when he was made a judge of the Second Circuit. Clark is best known for his reform work as Reporter to the Advisory Committee on the Federal Rules of Civil Procedure.<sup>89</sup> His affection<sup>90</sup> for the rules of procedure resulted in Learned Hand

v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), decided less than six months before the trial in *Hoffman v. Palmer*, which interpreted *Erie* to require federal courts in diversity cases to apply the conflict of laws rule of the state in which they sit.

81. Brief for Plaintiff-Appellee, *supra* note 59. The discussion of the exclusion of the business record began at page 9 and concluded approximately a quarter down the next page. The burden of proof issue began at page 12 of the brief and concluded at page 20. The first five-and-one-half pages of the Brief were devoted to a recitation of the pleadings and facts.

82. Reply Brief for Appellants, *supra* note 59. The reply brief was six pages in length.

83. See Reply Brief for Appellants, *supra* note 59, at first page (date-stamp of receipt of brief).

84. *Hoffman v. Palmer*, 129 F.2d 976 (2d Cir. 1942).

85. On Swan, see Learned Hand, *Thomas Walter Swan*, 57 YALE L. J. 167 (1947); Eugene V. Rostow, *Thomas W. Swan, 1877-1975*, 85 YALE L.J. 159 (1975); Arthur L. Corbin, *The Yale Law School and Tom Swan*, YALE L. REP., Spring 1958, at 2; SCHICK, *supra* note 9, at 19-23.

86. On Clark, see JUDGE CHARLES EDWARD CLARK (Peninah Petruck ed. 1991); Eugene V. Rostow, *Judge Charles E. Clark*, 73 YALE L.J. 1 (1963). A bibliography of articles about Clark is found in SCHICK, *supra* note 9, at 361. See generally LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-60*, at 115-40 (1986). As is the case with Morgan, there is no entry on Clark in the *Dictionary of American Biography*.

87. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 282 (1994) (noting comment made to Hand by Ned Burling).

88. John P. Frank, *The Top Commercial Court*, FORTUNE, Jan. 1951, at 92.

89. On the history of the Federal Rules of Civil Procedure, see Stephen N. Subrin, *How Equity*

frequently, and sarcastically, referring to him as "The GLAPP," or "The Greatest Living Authority on Practice and Procedure."<sup>91</sup> Unlike Swan, Clark was a long-time political liberal and progressive reformer.

Frank, who assumed office on May 5, 1941, was the author of *Law and the Modern Mind* and a controversial New Dealer.<sup>92</sup> He was educated at the University of Chicago and practiced law in that city for many years before moving to New York to practice on Wall Street. He was an indefatigable reader, curious about almost everything, and a prolific writer of a number of books and law review articles. Although he was considered brilliant by colleagues and acquaintances and found by nearly everyone to be "warm and personable,"<sup>93</sup> Frank was sensitive to criticism,<sup>94</sup> and apparently "unable to concede a point to an intellectual opponent."<sup>95</sup>

In contrast to the stellar abilities and accomplishments of the members of the panel hearing the appeal, the lawyers for the parties were nondescript. Hoffman's counsel of record,<sup>96</sup> Benjamin Diamond, was a 1930 graduate of the law school at St. Lawrence University in Canton, New York, and a sole practitioner in Brooklyn.<sup>97</sup> The trial and appellate arguments were conducted, however, by William Paul Allen. Allen, born in 1883, was a member of the firm of Fearey, Allen and Johnston until 1942, when he and

*Conquered Common Law: The Federal Rules in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Peter Charles Hoffer, *Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEG. HIST. 409 (1993). See also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

90. Professor Gunther, Learned Hand's biographer, calls it Clark's "passion." GUNTHER, *supra* note 87, at 522.

91. GUNTHER, *supra* note 87, at 300, 522. Gunther notes that Hand sent a ditty to his colleague Harrie Chase about Clark's devotion to the "wules," as Clark apparently pronounced them.

Dare we construe any wule sans Charles? I submit the following verses:

There once was a fellow named Clark  
Who thought it a Hell of a lark  
To discuss about wules,  
And then call us fools,  
Because we were so in the dark.

GUNTHER, *supra* note 87, at 522 (quoting Letter from Learned Hand to Harrie Chase (April 24, 1940)). Clark's impression on Hand must have been strong, for when this letter was sent, Clark had been a member of the court only slightly more than a year.

92. On Frank's firing from the Agriculture Adjustment Administration, see PETER N. IRONS, *THE NEW DEAL LAWYERS* 173-80 (1982); GLENNON, *supra* note 9, at 98-101.

93. GLENNON, *supra* note 9, at 24 (including in the group the philosopher Morris Cohen, with whom Frank engaged in lengthy intellectual disagreement in the early 1930s).

94. GLENNON, *supra* note 9, at 24. See also GUNTHER, *supra* note 87, at 527 ("[W]hile [Frank] himself was quite sensitive to perceived slights, he was uninhibited in inflicting wounds on his adversaries.").

95. GLENNON, *supra* note 9, at 23.

96. By the time the case reached the Supreme Court, William Paul Allen was listed as the counsel of Howard Hoffman, and Diamond was listed as "of counsel." See Brief for Respondent, *Palmer v. Hoffman*, No. 300, October Term 1942 (on file with author).

97. 1 MARTINDALE-HUBBELL LAW DIRECTORY 1137 (72d ed. 1940).

Eugene P. Fitzpatrick formed the firm of Allen and Fitzpatrick.<sup>98</sup> On appeal to the Second Circuit,<sup>99</sup> Diamond and Allen were joined by Edward H. Wilson and Milton Dombroff. Wilson, sixty-six years old, was a graduate of New York Law School, and Dombroff was a 1931 graduate of St. John's University Law School. Both men were sole practitioners, and Allen, Wilson and Dombroff all practiced law at 70 Pine Street in New York City.<sup>100</sup> Counsel for the Railroad throughout this litigation was Edward R. Brumley, whose brief listing in Martindale-Hubbell noted only his location at Grand Central Terminal.<sup>101</sup> Only Wilson, who received an "a v" rating, was rated by Martindale-Hubbell. Presiding at the trial was Matthew Abruzzo, the least respected federal district judge within the Second Circuit.<sup>102</sup>

Finally, there is Morgan,<sup>103</sup> known to friends and acquaintances as Eddie. Morgan was a short, thin, quite handsome man, and, as a longtime member of the American Law Institute, professor at Harvard Law School (1925-50) and editorial director of the University Casebook series of Foundation Press, a prominent member of the legal establishment. Morgan was also stubborn and argumentative, traits he traced to his Welsh heritage, a heritage of which he was quite proud. In mid-1942, at the age of sixty-three, with the departure of James Landis to Washington, Morgan was appointed Acting Dean of Harvard Law School, a position he would hold for the remainder of World War II. After the third call from his alma mater, Morgan became a member of the Harvard Law

98. See *id.* at 1068 (listing in Biographical Section firm of Fearey, Allen and Johnston); 1 MARTINDALE-HUBBELL LAW DIRECTORY 1137 (74th ed. 1942) (listing in Biographical Section firm of Allen and Fitzpatrick). The Brief for Plaintiff-Appellee in the Second Circuit, *supra* note 59, makes no mention of either "firm," and these organizations may have been office arrangements more than partnerships. Allen also argued the case before the United States Supreme Court. *Palmer v. Hoffman*, 318 U.S. 109, 110 (1943).

99. The Brief for Respondent filed in the Supreme Court lists only Allen and Diamond.

100. All this information is taken from the 72d edition of the Martindale-Hubbell Law Directory. Neither Wilson nor Dombroff placed a listing in the Directory's Biographical Section. Instead, each was simply given a one-line summary. See 1 MARTINDALE-HUBBELL LAW DIRECTORY 1355, 1446 (72d ed. 1940).

101. This listing is the same for the years 1938-42. See *id.* at 1342. Listed as of counsel to the trustees for the Railroad in the petition for certiorari were B.J. Seifert and A.G. Kuhbach, and in the petition for rehearing A.G. Kuhbach and R.W. Rickard. As Frank noted in his opinion, Brumley represented the Railroad in previous litigation. See *Hoffman v. Palmer*, 129 F.2d 976, 998 (2d Cir. 1941).

102. SCHICK, *supra* note 9, at 137-38 ("While Learned Hand was chief judge none of the several dozen district judges within the Second Circuit was as lowly regarded or criticized so often in print by the appellate court as was Abruzzo."). One district judge who came close, however, was Judge Robert A. Inch, also a district judge in the Eastern District of New York, disparagingly called "Judge Millimeter" by Hand. See GUNTHER, *supra* note 87, at 302.

103. In addition to the cast of characters noted above, I could include Justice William O. Douglas, who wrote the opinion for the Supreme Court unanimously affirming the decision of the Second Circuit. Douglas was a friend of Frank's from the earliest days of the New Deal. See William O. Douglas, *Foreword to A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK*, *supra* note 1, at xvii. Clark was Dean when William O. Douglas was hired as a professor at Yale. He also was Dean when Jerome Frank received an appointment in 1934 as research associate at Yale, although this appointment apparently meant little, for Frank did not spend any time in New Haven then. Frank began teaching at Yale as an adjunct professor after World War II, and thus well after Clark had left Yale for the Second Circuit.



School faculty in 1925.<sup>104</sup> Before Harvard, Morgan taught at the University of Minnesota and Yale, respectively. Morgan knew Swan<sup>105</sup> and Clark quite well from his years at Yale. After five years at the University of Minnesota, Morgan was hired by Dean Tom Swan to begin teaching at Yale in the fall of 1917, although he did not arrive until 1919, after two years in Washington in the Judge Advocate Corps. During the six years Morgan taught at Yale, he was a colleague of both Charles E. Clark, who also joined the Yale law faculty in 1919, and Tom Swan, who was Dean throughout Morgan's years at Yale. In addition to Evidence, Morgan taught Civil Procedure and Practice Court at Yale. Clark also taught Civil Procedure.

In 1935, Clark was named Reporter for the Advisory Committee on the Federal Rules of Civil Procedure. One of the most influential members of the Committee was Morgan, the author of a casebook on Pleading. In 1939, Morgan was appointed Reporter of the American Law Institute's (ALI) Committee on the Model Code of Evidence. In an attempt to avoid an initial attack on the Committee's competence, as well as to prevent interference with its work, the unchallenged authority on the American law of evidence, John Henry Wigmore, was named Chief Consultant.<sup>106</sup> Morgan and Wigmore's wary relationship dated back over twenty years, to their work at the Judge Advocate Corps in Washington during World War I.<sup>107</sup> In 1940, when Wigmore attacked the structure of the proposed Model Code, claiming it was not specific enough, it was Clark who suggested

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104. See Corbin, *supra* note 85, at 25.

105. Swan graduated from Harvard Law School in 1903, and Morgan graduated from there in 1905. I do not know whether they knew each other as students.

106. In a letter dated December 6, 1938 to William Draper Lewis, Executive Director of the ALI, Morgan wrote asking "whether any group drafting a code of Evidence can be formed without including Wigmore. To include him would doubtless extend the time required to get the job done. To exclude him would, I should suppose, require an explanation which it would be rather embarrassing to make." Letter from Edmund M. Morgan to William Draper Lewis (December 6, 1938) (Edmund M. Morgan Papers, Harvard Law School Library, Box 1, Folder 2) [hereinafter Morgan Papers]. The decision to give the seventy-five-year old Wigmore the title of Chief Consultant (along with a salary of \$100 per month) but exclude him from the Committee was intended to both placate Wigmore and allow Morgan to draft a code as he desired.

107. In early 1919, a dispute over the fairness of the system of military justice erupted. A military general in the judge advocate corps and Acting Judge Advocate General, Gen. Samuel T. Ansell, promoted reform. His superior, Judge Advocate General Enoch H. Crowder, rejected Ansell's call for reform and demoted him to his prewar rank of Lieutenant Colonel. Supporting players chose sides: Morgan, a major, publicly supported Ansell, and Wigmore, promoted to colonel during the War, supported Crowder. In June, 1919, Morgan and Wigmore engaged in public debate before the Maryland State Bar Association about the system of military justice. See Address by Col. John H. Wigmore before the Maryland State Bar Association (June 28, 1919), in 24 MD. ST. B. TRANS. 183 (1919); Address by Col. Edmund M. Morgan before the Maryland State Bar Association (June 28, 1919), in 24 MD. ST. B. TRANS. 197 (1919). I plan to write about this event in greater detail, for I believe it offers some insight into the relatively chilly relationship between Wigmore and Morgan and may help to explain their differences of opinion concerning specific rules and the general structure of the rules of evidence. On the Crowder-Ansell debate, compare Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967) (concluding Ansell's position was right) with Frederick Bernays Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989) (blaming Ansell for the dispute).

the proposed draft was *too* specific. As Morgan later put it, the choice was "between a catalogue, a creed, and a Code. The Institute decided in favor of a code."<sup>108</sup>

In the 1930s, Morgan and Frank began a fitful exchange of correspondence. It started after Frank's article, *Why Not a Clinical Lawyer-School?*,<sup>109</sup> was published. Morgan, whose work developing "Practice Court" at both the University of Minnesota and Yale was something of which he was very proud, wrote Frank a letter criticizing some of Frank's proposals. Frank replied in defense of his proposal, Morgan responded defending his criticism, and the pattern of future exchanges was set.<sup>110</sup>

On May 26, 1942, Frank wrote Morgan,

Dear Eddie:

We have a question of evidence which might interest you. The issue is the admissibility of a report made to his employer by a railroad engineer following a collision between his train and an automobile. I'm especially interested to know whether, if such reports were customarily made after accidents, you would call them entries made in the regular course of business, and whether you have considered the problem in your various capacities as Commonwealth Fund Expert, A.L.I. Restater, etc.<sup>111</sup>

Morgan replied, "The inquiry in your letter of May 26 seems to me to admit of an easy answer. I should classify the reports made in the regular course of duty by the

108. Edmund M. Morgan, *Foreward to MODEL CODE OF EVIDENCE* 13 (1942). The story of the Model Code of Evidence is detailed in Ariens, *Progress Is Our Only Product*, *supra* note 12, at 229-37. Clark declined an invitation to serve as a consultant to the Model Code Committee due to his "real concern over the product." His concern was that the code was too particularized, the "great bane of the law of evidence today" and something which was "against the modern trend." Letter from Charles Clark to William Draper Lewis (February 23, 1940) (Morgan Papers, *supra* note 106, at Box 2, Folder 2). Clark would later air his disagreement with the drafters of the Code at the Annual Meeting of the ALI in May 1940. See 17 A.L.I. PROC. 66, 80-84 (1940).

109. Jerome N. Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

110. See Letter from Morgan to Frank (July 5, 1933); Letter from Frank to Morgan (July 11, 1933); Letter from Morgan to Frank (August 11, 1933). All correspondence between Frank and Morgan is found in the Jerome N. Frank Papers, Sterling Memorial Library, Yale University, Box 14, Folder 166 (1933, 1935 correspondence), Box 61, Folder 631 (1941-45, 1947-48, 1952 correspondence) [hereinafter Frank Papers], and Edmund M. Morgan Papers, *supra* note 106, at Box 5, Folders 4, 8, 9, 10, and Box 6, Folder 1. Frank's sensitivity to criticism is well displayed in his July 11, 1933 letter to Morgan. Frank claimed that Morgan, in reviewing a book titled *A Judge Takes the Stand*, had implicitly attacked Frank and had accused him of being "some kind of brash publicity seeker" and of writing *Law and the Modern Mind* "in a lurid fashion in order to make it sell." Letter from Jerome Frank to Edmund M. Morgan (July 11, 1938) (Frank Papers, *supra*, at Box 14, Folder 166; Morgan Papers, *supra* note 106, at Box 5, Folder 4). Morgan denied making such charges and claimed, "Indeed, I have a strong suspicion that the differences in our views would settle down to differences in emphasis." Letter from Edmund M. Morgan to Jerome Frank (August 11, 1933) (Frank Papers, *supra*, at Box 14, Folder 166; Morgan Papers, *supra* note 106, at Box 5, Folder 4).

111. Letter from Jerome N. Frank to Edmund M. Morgan (May 26, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 8).

engineer as statements or entries made in the regular course of business."<sup>112</sup> Later in the same letter, Morgan wrote,

The case which you suggest is clearly distinguishable from *Johnson v. Lutz*, 253 N.Y. 124, for there was no duty on the by-standers to report to the policemen, and I take it that in your case there was a duty on the engineer to make the investigation and report what he found . . . .<sup>113</sup>

Frank responded ten days later by writing, "As to my views—well, I'd better say nothing until our opinion is published."<sup>114</sup>

#### IV. *HOFFMAN V. PALMER*

##### A. *The Opinion*

Frank's opinion is masterful. For a lawyer who spent nearly all of his career as a private lawyer in corporate reorganization work and most of his career in public service creating the administrative state, his use of sources is amazingly broad. He was given little help by the parties' briefs, no help at all by the trial court's decision,<sup>115</sup> and still managed to write an opinion covering nearly twenty pages of the Federal Reports in approximately a month's time. Although a judge for just slightly over a year, the opinion is crafted in Frank's peculiar style; it is an essay of an autodidact about both law and the human condition, captured in the framework of an opinion.

Frank's opinion affirmed the judgment in favor of the plaintiff Hoffman. On the issue the lawyers believed most important, the issue of the burden of proof concerning contributory negligence, the panel unanimously (and quite briefly) agreed that the trial

112. Letter from Edmund M. Morgan to Jerome N. Frank (May 29, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 8).

113. Letter from Edmund M. Morgan to Jerome N. Frank (May 29, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 8).

114. Letter from Jerome N. Frank to Edmund M. Morgan (June 8, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 9). Frank then continued his letter by asking Morgan a number of questions concerning the ALI's Model Code of Evidence, whose Reporter was Morgan.

115. The record in the case indicates the following colloquy concerning the admissibility of the engineer's statement:

Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.

The statement was signed by the engineer, and is marked for identification as Exhibit J, under Section 695 USCA 28.

The defendants offer the proof also that this statement was signed in the regular course of any business, and that it was the regular course of such business to make such statement.

Mr. Allen: I object to the statement.

The Court: Mr. Allen objects to the introduction of this statement in evidence, and the Court sustains the objection and grants an exception to the defendant.

Record, *supra* note 59, at 421.

court had properly assigned the burden of proof to the railroad.<sup>116</sup> Although only perfunctory attention was paid the issue of the admissibility of the engineer's report<sup>117</sup> by

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116. *Hoffman v. Palmer*, 129 F.2d 976, 998, 1002 (2d Cir. 1942). In the Supreme Court, the issue was not dismissed quite so summarily. Although the trial court may have correctly placed the burden of proving contributory negligence on the defendant concerning the Massachusetts statutory claim, the court probably erred in placing this burden on the defendant regarding the common law claim. However, because the defendant did not differentiate between the statutory and common law claims in his request for an instruction placing the burden concerning contributory negligence on the plaintiff, the defendant's general exception to the court's decision to place the burden on the defendant was not specific enough to "obtain a new trial." *Palmer v. Hoffman*, 318 U.S. 109, 116-20 (1943).

117. The "statement" of the engineer, Harold D. McDermott, is as follows:

Q. [by Mr. J.W. Cuineen, Assistant Superintendent of the Railroad]: How long employed by the New Haven Railroad?

A. 33 years.

Q. In what capacity? A. Fireman and Engineer.

Q. How long an Engineer? A. 22 years.

Q. You are qualified on the characteristics of the Railroad between Pittsfield, Great Barrington, and State Line? A. Yes, Sir.

Q. You were engineer on engine 438 with Conductor Johnson on December 25th? A. Yes, Sir.

Q. What time did you leave Daly's? A. 5:45 P.M.

Q. What did you have? A. Engine and caboose.

Q. You were headed south? A. Backing up.

Q. You had a back-up headlight on the tender? A. Yes, sir, a good one.

Q. Where did you light it? A. Daly's.

Q. Where was the caboose? A. On the nose of the engine.

Q. Then the tender of the engine was the first vehicle out? A. Yes, sir.

Q. How many cars did you have leaving Pittsfield? A. I really don't know.

Q. Did you use your air brakes between Pittsfield and Daly's? A. I don't remember.

Q. Had you used your air brake before the accident? A. No.

Q. When you coupled onto the caboose at Daly's did you test your air? A. No.

Q. Why not? A. Just didn't, cut the air in and doubled the pressure.

Q. Did you make a running test? A. No, sir.

Q. Approaching Weststockbridge, the first highway crossing north of the station what whistle signals were given for that crossing? A. Regulation crossing whistle two long two short repeated.

Q. Where? A. Whistling post and repeated to finish just as the engine hit the crossing.

Q. You have an automatic bell ringer? A. Yes.

Q. When did you start it? A. It was going all the way from the whistling post at the first crossing until after the accident happened.

Q. What was the weather condition? A. Clear.

Q. How fast were you running between W. Stockbridge and where the accident occurred? A. 15 m.p.h.

Q. When did you last observe that the light on the tender was burning? A. When I put it out at State Line.

Q. It was burning after the accident? A. Yes.

Q. When you were backing up did you notice any automobiles on your side of the crossing? A. Yes,

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there was one on the hill approaching the crossing.

Q. Did you notice any on the other side? A. No, I can't see the crossing on account of the tender.

Q. You only seen that one car standing there? A. Yes. Just the one.

Q. What was the first intimation you had of the accident? A. I heard this peculiar noise and the fireman hollered that we have got a car. I put the brakes in emergency.

Q. Give her sand? A. Yes.

Q. When the engine stopped how far was the engine north of the crossing? A. 1½ to 2 pole lengths.

Q. What was the weather condition at that time? A. Clear.

Q. After you stopped did you get off the engine? A. I went back to see what damage was done.

Q. What did you find? A. This Ford Coupe down the bank.

Q. Was it on its side? A. I would say it was it was tipped at a ninety degree angle.

Q. Which way was the auto traveling? A. Toward West Stockbridge pretty near due east.

Q. Assuming that the Railroad is north and south as your time table says which way would the automobile be traveling? A. Coming from the east going west.

Q. When you got back there what did you find? A. This overturned Ford Coupe with this lady and gentleman in it.

Q. Where was the lady when you seen her? A. On the ground laying down. The door was open.

Q. Was she conscious? A. No.

Q. Did you help to take her out of the car? A. No.

Q. Was she alive? A. Yes, she was breathing but unconscious. I don't know how she got out on the ground.

Q. Did you help take the man out? A. No, I did not.

Q. What was his position in the car? A. He was pinned in by the steering wheel.

Q. Did you make any inspection of the engine? A. Yes.

Q. What did you find? A. The step on the tank bent and the step on the engine broken.

Q. That would indicate that he ran into the side of the tank and was not dragged or pushed by the front of the tank? A. No, he hit with force to throw him against that pole and down the bank.

Q. Did you notice any marks on the telephone pole? A. No, I did not.

Q. Do you drive an automobile? A. Yes.

Q. Have you driven over that crossing? A. Every day going to work and going home daily as much as anyone.

Q. What kind of a road is it? A. State Road, rough it isn't cement, macadam.

Q. In your experience in driving over that crossing how far back on the highway could you see a headlight of an approaching train? A. Why half a mile right near that house up there.

Q. There is a little bridge down there how far is that from the tracks? A. 100 feet.

Q. You would be able to see a train from there and stop in time for it? A. Yes, sir, if you had any brakes at all.

Q. Assuming that you were traveling 15-18 m.p.h. how long would it take you to stop? A. About a car length.

Q. When you applied the brakes did they function perfect? A. Yes, sir, 100%.

Mr. Christie [of the Massachusetts Public Utility Commission]:

Q. From what you saw the man was the driver of the car? A. Absolutely he was behind the wheel.

Q. Where was your engine when you applied the brakes? A. I was over the crossing. I put the brakes on after he hit. It was all simultaneous. I heard the noise, the fireman hollered and I put the brakes on. Even if the fireman did not holler the action would have been the same.

either party, Frank began his discussion with this issue.

Because Frank's opinion was an effort to affirm the judgment, it was structured to close off all avenues of escape from the sanction of the hearsay rule. Frank first assessed whether there was any applicable exception to the hearsay rule in the common law of evidence. Of course, the reason for the reform statute was precisely because the common law prohibited the introduction of the business report, so the conclusion to Frank's assessment was foregone.<sup>118</sup> Because the statement was "so plainly barred at common law," the only question remaining was whether the federal statute made the statement admissible.<sup>119</sup>

What was crucial, according to Frank, was the court's interpretation of the words "regular course of business" as used in the statute. These words, "twice employed in the legislation, are not colloquial words, but are words of art, with a long history."<sup>120</sup> As a term of art, this phrase, which might to a layman "seem to mean any record or paper prepared by an employee in accordance with a rule established in that business by his employer," actually meant in the "jargon of lawyers and judges" only those records made in which there were "*some* safeguards against the existence of any *exceptionally* strong bias or *powerful* motive to misrepresent."<sup>121</sup> Because the common law history of the business records exception was rooted in the requirement of an absence of a motive to misrepresent, any statute using the phrase "regular course of business" "would, therefore, require unequivocal expressions in the statute or its legislative history to yield an interpretation of those words, defying their history, which would render admissible a memorandum made in circumstances that disclose the strongest likelihood of the existence of a motive to misrepresent."<sup>122</sup>

To prove that the statute did not include this "unequivocal expression," Frank looked at the history of the reform statute, including its implementation and interpretation in New York. New York's interpretation was important in understanding the federal act because it was a "general rule that where a statute has been previously enacted in another jurisdiction, interpretations . . . in another jurisdiction are to be followed."<sup>123</sup> These constructions were "peculiarly persuasive where the statute is designed to be

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Q. Your engine was in good mechanical condition? A. Yes, sir.

I have read my statement consisting of 4 pages and it is true and correct.

Signed HAROLD D. MCDERMOTT.

Record, *supra* note 59, at 496-99 (Defendants' Exhibit J for Identification).

118. In so holding, Frank concluded that the common law exception for business records was dependent on the declarant having "no peculiarly powerful motive to misrepresent; such a motive, if it exists must be relatively minimal and marginal." *Hoffman*, 129 F.2d at 980. In Frank's view, "the absence of any vigorous motive to misrepresent . . . is inherent in virtually all the exceptions to the hearsay rule, such as declarations about private boundaries, statements or records concerning family history, spontaneous declarations, and dying declarations." *Id.* at 981.

119. *Id.* at 983.

120. *Id.*

121. *Id.* at 984 (emphasis in original).

122. *Id.*

123. *Id.* at 985.

'uniform.'"<sup>124</sup> Although the most well known New York precedent appeared to be *Johnson v. Lutz*,<sup>125</sup> Morgan had already noted a crucial difference between *Lutz* and *Hoffman*: Unlike the bystanders in *Lutz*, who "voluntarily" provided the information to the police officer whose report was offered as evidence, the engineer McDermott was under a duty to make a statement concerning the accident. Avoiding *Lutz*, Frank turned instead to a decision of the Appellate Division of the New York Supreme Court, *Needle v. New York Railways Corp.*<sup>126</sup> *Needle* was decided shortly before the decision of the Court of Appeals in *Lutz*. In *Needle*, the Appellate Division reversed the trial court and held inadmissible a police blotter which contained statements made to the officer by bystanders as well as the conductor of the trolley car which struck the plaintiff as she was crossing Lexington Avenue in New York City. According to Frank, the court held the police blotter inadmissible in part because "his report was based on the oral statement of others, including, as the court said, that 'of the *interested motorman*, who, instead of being so placed as to be presumed to be without a motive to falsify in helping to make the record, *had every reason to give a biased and false report*.'"<sup>127</sup> When Congress passed the reform statute in 1936, "[n]o change in its verbiage was suggested or was made to indicate an intention to deviate from that reasonable New York interpretation."<sup>128</sup> A "not inflexible" rule of statutory construction required courts to follow the "reasonable" interpretation of a statute previously interpreted in another state, so Frank concluded that "the *Needle* case . . . should be followed as entirely reasonable."<sup>129</sup>

To prove that *Needle* reasonably interpreted the reform statute and the phrase "regular course of business," Frank developed four lines of attack. First, he suggested the main reason for the statute may simply have been a dissatisfaction with the authentication requirement of the common law.<sup>130</sup> Second, he concluded that it was "*without doubt*" that the sponsors of the Model Act, Wigmore and Morgan, "*did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning*."<sup>131</sup> Third, "[i]t is our function to find out what Congress intended," and "we must not allow our personal preferences for

124. *Id.*

125. 170 N.E. 517 (N.Y. 1930).

126. 237 N.Y.S. 547 (N.Y. App. Div. 1929).

127. *Hoffman*, 129 F.2d at 984-85 (quoting *Needle*, 237 N.Y.S. at 549) (emphasis added by Frank).

128. *Id.* at 985.

129. *Id.*

130. Frank noted that the Commonwealth Fund Evidence Committee criticized the common law rule for requiring the testimony of every person who was involved in the transaction, so "[o]ne reading the report of the Committee might, therefore, reasonably assume that perhaps its chief purpose was the desire to avoid the necessity of proving each link of such a chain." *Id.* at 986.

131. *Id.* (emphasis in original). At a slightly later point in the opinion, Frank wrote:

It is suggested that Morgan and Wigmore have said that it was intended that such reports should be admissible. But we have been unable to find that either of them has ever published any such comments, i.e., that they have ever discussed the problem which is here before us, in a case arising under the statute, either vis a vis the *Needle* case or otherwise.

*Id.* at 990. But Frank had corresponded privately with Morgan, and knew Morgan's opinion regarding the "problem . . . here before us," something he did not share publicly.

a more extensive reform to govern our decision.”<sup>132</sup> Because Congress chose to use rather than omit the phrase “regular course of business,” and because those words enjoyed a specific historical meaning, “[w]e must assume that Congress used them deliberately with recognition of their history.”<sup>133</sup> Fourth, Frank concluded that even assuming the *Lutz* case was erroneously decided,<sup>134</sup> *Needle* was clearly distinguishable from *Lutz*.<sup>135</sup>

In conclusion, then, engineer McDermott’s statement was not admissible, because it “by its very nature, is dripping with motivations to misrepresent.”<sup>136</sup> After canvassing and distinguishing any possible precedent in the Second Circuit, Frank concluded, “to repeat, we know of no case in any court holding, or even intimating, that such an obviously motivated record as that here before us is admissible under that Act.”<sup>137</sup>

To close the circle, and as if he were attempting to persuade Morgan, Frank noted the following: (1) The element of an absence of a motivation to misrepresent did not return the state of evidence law to the primitive days of a century ago, for both Wigmore, in his *Treatise*, and Learned Hand, in a recent decision, had noted the importance of a motive to speak the truth in admitting statements otherwise barred by the hearsay rule; (2) the requirement of an absence of motive to misrepresent did not create an unworkable standard, for like all questions of degree, it did not leave “the extent of the disqualifying motive under § 695 at large.” For Frank, it was clear that the statute did not permit the introduction of accident reports “where the primary purpose of the employer, obvious from the circumstances, in ordering those accidents is to use them in litigation involving those accidents”;<sup>138</sup> (3) the railroad never argued that the presence of the Massachusetts Utilities Commission representative made the report admissible as a public record, although in dictum Frank declared this a futile effort;<sup>139</sup> and (4) the death of engineer McDermott before trial made no legal difference. There existed no common law

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132. *Id.* at 987. These quotes are in the reverse of Frank’s order.

133. *Id.* at 986. Frank then quoted extensively from the COMMITTEE REPORT, *supra* note 47, concluding that the “limited objective at which Congress was in fact driving” was to eliminate the onerous authentication requirement. *Hoffman*, 129 F.2d at 987. This material was added to the opinion after it was first released.

134. Frank apparently did not share this assumption, for he used a classic appeal to authority for the correctness of the *Lutz* decision, noting that it was “unanimous,” written by Judge Lehman, “who had previously indicated that the regular entry exception ought to be liberally construed,” and joined by Judge Cardozo, “who had not only written in a similar vein, but was also a member of the Legal Research Committee of the Commonwealth Fund, which sponsored the Model Act.” *Hoffman*, 129 F.2d at 990 (footnotes omitted).

135. Among the differences between the two cases were that, apparently unlike the bystanders in *Lutz*, the motorman in *Needle* possessed personal knowledge of the accident and “was probably under a duty to state the facts to the investigating policeman.” *Id.* For my criticism of this interpretation, see *infra* text accompanying notes 191-206.

136. *Hoffman*, 129 F.2d at 991.

137. *Id.* at 993.

138. *Id.* The Supreme Court relied on this formulation of Frank’s decision in affirming the Second Circuit decision. “In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. . . . [T]hese reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.” *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943).

139. *Hoffman*, 129 F.2d at 993-94.



exception to hearsay based on the death before trial of the declarant,<sup>140</sup> and the reform statute was worded without regard to the availability of the maker of the statement. Additionally, Rule 503(a) of the ALI's Model Code of Evidence, which permitted the introduction of hearsay statements upon a showing of the declarant's unavailability, was, as Frank noted, merely "a proposed statute," which "gives courts no authority."<sup>141</sup> Thus closed, the exclusion of the engineer's statement did not constitute error.<sup>142</sup>

Clark wrote a blistering, and blustery, dissent. Because the decision "seems to me directly opposed to the intent of the statute, as shown by its plain terms as well as its history and background," and because the decision "originates a process of restrictive interpretation of the statute which we have hitherto unanimously repudiated,"<sup>143</sup> Clark dissented. Above all, Clark noted, "zeal against reform is as much to be guarded against as zeal for reform."<sup>144</sup>

After quoting pertinent parts of the statute, Clark noted that the engineer's statement was "direct relevant testimony of the kind which any court of justice ought to desire to admit."<sup>145</sup> Not only was the fear of a motive to misrepresent "a reason which went out of favor a century ago," but "if the turning point is the degree of possible motivation, then we have a hopelessly unfair subjective test depending upon the initial brusque reactions of the trier."<sup>146</sup> As for the argument that creating a record for use in a lawsuit made it

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140. This is why Appleton, unsuccessfully, and later Thayer, successfully, suggested reforming the rules to admit a statement made by one who died before trial. Frank did not note the Massachusetts law, originally passed in 1898 at Thayer's behest, which permitted the introduction of hearsay statements made by persons who had died before trial, as long as the statement was made in good faith before commencement of the litigation. See MASS GEN. L. ch. 233, § 65 (Ter. ed., 1932). Because the case was tried in federal court, all "procedural" rules, including all "procedural" rules of evidence, were based on federal, not state, law. See *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). Had the case been tried in Massachusetts, the statement might have been admissible under Massachusetts law. Cf. *Nagle v. Boston & N. St. Ry.*, 73 N.E. 1019 (1905) (holding admissible a self-serving statement of a motorman offered by his estate in the action arising from the conduct which the statement favorably explained).

141. *Hoffman*, 129 F.2d at 995.

142. Both of the other two claims of evidentiary error were troublesome as well, although reversal was not required. The decision of the trial judge permitting the plaintiff to introduce into evidence a statement written by a witness before trial if defense counsel requested to peruse it was error, but not reversible error, for two reasons. One reason was waiver, for Brumley had not requested the trial court to certify the statement to the court of appeals, so it was not in the record. The second reason was that Brumley, representing the same party in a case two years earlier, had successfully argued in favor of the rule he was now complaining about! *Id.* at 997-98. (This part of Frank's opinion is noteworthy for his facility in citing Santayana, Vaihinger, Montaigne, Maitland, Henry Maine, Roger Bacon and Herbert Spencer, among others, in a mere two pages). The refusal of the trial court to permit a defense witness to testify to certain observations made by him was apparently not in error because the conditions about which the witness was to testify were not "identical" or "comparable" (Frank uses both standards) to the circumstances at the time of the accident. *Id.* at 998.

143. *Id.* at 999 (Clark, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.* at 1000. Clark reiterated this point at the end of his dissent: "Stress is laid on the existence of a powerful motive to misrepresent; but what constitutes such a motive is left at large, seemingly to the hasty

unreliable, Clark noted that the Second Circuit had already rejected that in *United States v. Mortimer*,<sup>147</sup> and suggested that “the purpose and the value of records were their use in future disputes—to prevent many, to settle others.”<sup>148</sup> Most importantly to Clark, the majority’s narrow interpretation of the business records reform statute was flawed because it failed to recognize “what the trend of the times is,”<sup>149</sup> a trend of liberal interpretation of the rules of evidence.

### B. *The Dispute Among Frank, Clark and Morgan*

At about the same time Frank was soliciting advice from Morgan, he was doing the same with the other members of the Second Circuit, Senior Circuit Judge<sup>150</sup> Learned Hand,<sup>151</sup> Learned’s cousin Augustus Hand,<sup>152</sup> and Harrie Chase.<sup>153</sup> From Frank’s appointment in May 1941, until Learned Hand’s retirement in 1951, the membership of the court remained the same. During that time, the court’s reputation as the second most important court in the country was solidified.<sup>154</sup> However, as one scholar of the Second Circuit has noted, “From not long after Jerome Frank took his seat on the Second Circuit

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discretion of the trier, in the midst of a case.” *Id.* at 1002.

147. 118 F.2d 266, *cert. denied*, 314 U.S. 616 (1941). In *Mortimer*, decided a little over a year before *Hoffman*, the Second Circuit permitted the government to introduce several charts showing defaults by defendants of mortgaged properties, even though the charts were made in preparation for the trial. *Id.* at 270. The decision was written by Judge Clark for a panel that included Learned and Gus Hand. Because his conclusion was not solely based on the fact that the statement “was made after litigation was imminent,” Frank considered *Mortimer* distinguishable. *Hoffman*, 129 F.2d at 991-92. Clark also noted that the decision of the majority “sets aside quite peremptorily the reasoning of several unanimous decisions of this court.” *Hoffman*, 129 F.2d at 999 (citing, in addition to *Mortimer*, *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940) (death certificate of coroner indicating death from ptomaine poisoning), *Ulm v. Moore-McCormack Lines*, 115 F.2d 492 (2d Cir. 1940), *reh’g denied*, 117 F.2d 222 (2d Cir. 1941), *cert. denied*, 313 U.S. 567 (1941) (hospital records offered by defendant to prove plaintiff’s injury a result of drug use); and *Reed v. Order of United Commercial Travelers*, 123 F.2d 252 (2d Cir. 1941) (hospital record of diagnosis of plaintiff indicating “still apparently well under influence of alcohol”)) (cases in the order given by the court)). In each of these cases, Clark was a member of the panel, and in each case the court found the business record was admissible under the federal business records statute. In addition to his opinion in *Mortimer*, Clark also wrote both opinions in *Ulm*. Frank was a member only of the panel that decided *Reed*, a *per curiam* opinion. Frank believed all of these cases were distinguishable, either because there existed no “impelling motives to misrepresent” or because the records involved in those cases were more “trustworthy,” or because the Second Circuit followed *Lutz* or failed to distinguish (or cite) *Needle*. *Hoffman*, 129 F.2d at 991-92.

148. *Hoffman*, 129 F.2d at 1000 (Clark, J., dissenting).

149. *Id.* (footnote omitted).

150. In 1948, the term “senior circuit judge” was replaced by “chief judge.” SCHICK, *supra* note 9, at 5 n.1.

151. On Learned Hand, see GUNTHER, *supra* note 87.

152. On Augustus Hand, see Charles Wyzanski, *Augustus Noble Hand*, 61 HARV. L. REV. 573 (1948).

153. See SCHICK, *supra* note 9 at 26-29; JEFFREY B. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT* 143 (1986).

154. Wyzanski, *supra* note 152; Frank, *supra* note 88. A later appraisal by a former law clerk is Philip Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661 (1957).

until the retirement of Learned Hand a decade later, the outstanding feature of the court's work—except for the decisions handed down—was the virtually uninterrupted friction between Judges Clark and Frank, the court's junior members."<sup>155</sup> The actions taken by Frank and Clark in the *Hoffman* case played some role in the deterioration of their relationship.

Shortly before the court's decision in *Hoffman* was first released, Frank and Clark exchanged letters accusing each other of improper action concerning the case.<sup>156</sup> During the course of writing his opinion, Frank wrote to Clark on June 22, 1942 that he had

discussed the question with Learned and Gus. Both of them disagreed with me. I, therefore, suggested that I ascertain how Harrie felt; I said to Learned and Gus that, if four of the six of us agreed with you, I felt it unwise that Tom and I should decide the question. Learned said No.<sup>157</sup>

Frank then claimed that after he and Clark discussed the matter with the Hands, Clark sent his dissent to them, which forced Frank to "show Gus mine." In Frank's view, Gus's reaction was, "He had previously felt the evidence admissible; my opinion made him less sure." Frank also told Harrie Chase about "both sides" and Harrie's "inclination was toward my views of the question."<sup>158</sup> Clark, a supporter of *en banc* decisionmaking, responded: "Under the circumstances . . . I do not believe it is proper to say that Gus has shifted ground or that Harrie has passed upon the matter. All that it is possible to say is

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155. SCHICK, *supra* note 9, at 219.

156. See Letter from Jerome Frank to Charles E. Clark (June 22, 1942); Letter from Charles E. Clark to Jerome Frank (June 23, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766). Clark, who did most of his work in New Haven, apparently preferred written exchanges to face-to-face conversations, in large part because he did not consider himself a felicitous debater. As noted above, Frank was a delightful, combative and persuasive conversationalist. But Clark apparently decided to try to see Frank regarding their disputes over *Hoffman* and the *Corning Glass* cases. See Letter from Charles E. Clark to Jerome Frank (July 1, 1942) (Frank Papers, *supra* note 110, at Box 120, Folder 1158) ("I stopped in to see you after our conference Monday, but we did not get through until late and you had gone.").

157. Letter from Jerome Frank to Charles E. Clark (June 22, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766). See also Letter from Jerome Frank to Charles E. Clark (July 6, 1942) (Frank Papers, *supra* note 110, at Box 120, Folder 1158), in which Frank writes:

As I've told you before, I then said to Gus and Learned (before you knew anything about their views) that I thought I should ascertain how Harrie would view the matter and that, if he agreed with you, the decision should go your way, as then Tom and I would be a minority of two out of six. Learned said, No. Then, when you came to town, you, Learned, Gus and I discussed the matter at lunch and Learned said he was opposed to a six-judge court. Then you sent Gus and Learned your dissent. Only then did I give Gus my draft of opinion. He said it made him somewhat less sure of his earlier disagreement with me. Learned didn't see my opinion (unless he's read it since it's been printed) and I don't know his reaction. I chatted with Harrie who said he thought he'd probably agree with me, but I told him to wait until my and your opinions were published.

Learned Hand opposed *en banc* decisions. SCHICK, *supra* note 9, at 102, 105.

158. Letter from Jerome Frank to Charles E. Clark (June 22, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766).

that the court is seriously divided on the question, and it is one which certainly ought to have gone before the full court.”<sup>159</sup>

By asserting that Chase’s “inclination” tended toward Frank and Swan’s position, Frank was now able to claim he was no longer in a position of arguing a minority view. The additional claim that Augustus Hand was “less sure” of his initial position made Frank’s position even more tenable. For someone as sensitive to criticism as Frank, his efforts to informally persuade the members not on the panel to his position may have been important, particularly because he knew that the criticism voiced in Clark’s dissent was likely to be joined by Morgan.

Part of Frank’s problem concerning his emendation of the business records exception was that both Hands served as members of the Advisory Committee to the Model Code of Evidence,<sup>160</sup> which Committee proposed a business records rule “based upon the Act recommended by the Commonwealth Fund Committee, which has been enacted by Congress.”<sup>161</sup> This was, of course, the Act at issue in *Hoffman v. Palmer*. Additionally, Frank’s predecessor on the Second Circuit, Robert P. Patterson, was also a member of the Committee on Evidence.<sup>162</sup> Finally (and speculatively), the fact that the case came from Abruzzo’s court would not have aided Frank’s cause, although the practice of the Second Circuit at this time was not to name the trial judge in its opinion,<sup>163</sup> and it is unclear whether the Hands were aware that Abruzzo was the trial judge.

Apparently looking for support, Clark sent the slip opinion to Morgan. Morgan angrily wrote to Frank:

Charlie Clark has sent me the opinions in the Hoffman case. I must say that you have done a fine job in statutory emasculation. If we should have a few more decisions like yours construing the business entry statute, we should get back almost to the common law rule. The idea that a business entry is inadmissible because the entrant had a motive to misstate, is the idea which made the English common law courts reject all business entries except when made by a servant in the course of duty. It played almost no part in the development of the modern rule in the United States, and was not regarded as an essential element of the rule in the great majority of cases. Every business entry charging another with an obligation to the entrant or to the entrant’s employer has some of the characteristics of a self-serving statement, but I do not want to argue the matter with you. I merely want to point out that in emphasizing this uncertain element in the common law rule, you have totally disregarded the language of the statute. The decision is all the more surprising to me coming, as it does, from a man whom I had always regarded as a liberal thinker in the law. Perhaps your liberalism is confined to substantive matter and perhaps your

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159. Letter from Charles E. Clark to Jerome Frank (June 23, 1942) (Frank Papers, *supra* note 110, at Conference Memoranda File, Box 92, Folder 766).

160. See MODEL CODE OF EVIDENCE at III (1942) (listing members of the ALI’s Committee on Evidence).

161. *Id.* at 271 (comment to Rule 514, entitled “Business Entries and the Like”).

162. *Id.* at III.

163. SCHICK, *supra* note 9, at 138-39.

faith in the common law processes of adjudication does not equal your faith in the administrative process.<sup>164</sup>

Frank's response to Morgan's one-page letter was an eight-page missive.<sup>165</sup> Beginning with "[i]f a judge says something with which E.M. Morgan disagrees, he's a reactionary, who doesn't take the judicial process seriously, and who is a careless, unscholarly, worker,"<sup>166</sup> Frank continued with several different defenses of both the decision and his actions. He became a judge only because he took the judicial process seriously, and although there was room for "judicial legislation," "we'll give the judiciary a black eye" "if we judges go to construing statutes so as to achieve results we like, without regard to the intention of Congress."<sup>167</sup> Even though Frank believed "the hearsay rule should probably be abolished," it was his duty to follow Congress's intentions, which were ascertainable from the Senate Judiciary Committee Report on the business records statute.<sup>168</sup> As the author of the Commonwealth Fund Committee proposal, on which the federal business records act was based, Morgan was probably the "worst person" to construe the statute. And Frank noted that Morgan himself had published nothing which "hinted" that the statute (or its predecessor reform proposals) was intended to go beyond eliminating the common law requirement that each entry maker authenticate his entry. Frank then cited Wigmore's *Treatise* for support that the motive to misrepresent was clearly a part of the history of the rule concerning the admissibility of business records. Penultimately, Frank used his abhorrence of the jury trial to defend his interpretation: "Except in criminal cases, I think the jury should be eliminated. It is, to my mind, the

164. Letter from Edmund M. Morgan to Jerome Frank (July 3, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). Morgan also wrote a short note that day to Clark, telling him that he had also written Frank and that, "you took him to town in your dissent, and I am puzzled to know why Tom Swan agreed with him." Letter from Edmund M. Morgan to Charles E. Clark (July 3, 1942) (Morgan Papers, *supra* note 106, at Box 5, Folder 10).

165. Letter from Jerome Frank to Edmund M. Morgan (July 8, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). All quotations in the paragraph that follow are taken from this letter.

166. In the final version of the *Hoffman* opinion, Frank wrote, "[o]ur decision here is no less liberal than the decisions of other state or federal courts interpreting the Model Act." *Hoffman*, 129 F.2d at 993. This passage was written before Frank received the July 3 letter from Morgan, but I believe it is reasonable to speculate that this was Frank's attempt to justify to Morgan, with whom he had earlier corresponded, as well as to himself (and maybe Clark) that he was not a "reactionary," but remained a "liberal."

167. Frank continued: "And we so-called 'liberals' ought to be singularly careful in that respect. We've beefed about the way the 'reactionaries' on the bench killed off legislation by excessive use of judicial legislation. We ought not now use the same devices with reverse English." That liberals feared being charged with excessive use of judicial legislation after the constitutional revolution of 1937 is discussed in Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 667-74 (1994).

168. Frank extensively quoted the Report to Morgan, and noted that he had failed to discuss the Report when defining "regular course of business" in his initial opinion. Possibly because of Morgan's response to Frank, the *Hoffman* opinion was revised and when released for official publication on July 31, 1942, included the information from the Senate Judiciary Committee Report in order to show the intent of Congress concerning the business records statute. See *Hoffman*, 129 F.2d at 987-90.

worst possible means of factfinding. More than any other factor, it tends to emphasize the trial as a mere game of wits.”<sup>169</sup> Special verdicts might bring some “sense” to the “jury system,” but opposition to this, as well as to “juries of experts” led to “a hopeless mess.” To prove that he was not a stickler for antiquated rules of evidence, including hearsay rules, Frank concluded, “As emotions—and not evidence or the court’s instructions—determine verdicts, without possibility of control, I see little harm in letting in anything. For, the more you let in, the more there is for the jury to disregard.” Finally, in a postscript, Frank again made an appeal to authority, noting that Cardozo joined the unanimous opinion of the New York Court of Appeals in *Johnson v. Lutz*, and asserted, as he had with Clark, support from the other Second Circuit judges: “[D]on’t be too sure that the judges of this court, other than Charlie, wouldn’t go along with the majority opinion in *Hoffman v. Palmer*.”

In a brief response,<sup>170</sup> Morgan disclaimed calling Frank “either a reactionary or a fool,” but reiterated his belief that the “opinion seemed to me to over-emphasize the statements in business entry cases and to rely upon what seemed to me outworn cautionary generalizations instead of accepting the general attitude of the forward-looking courts.”<sup>171</sup> Morgan promised a longer reply, which was sent on August 15, 1942.<sup>172</sup> Morgan again criticized Frank for “taking the traditionally conservative attitude toward procedural reform,” unlike the “forward-looking” approach Frank had “as an administrative officer and on question[s] of social policy.” Morgan agreed that the author of a statute is “the last man to interpret it,” but still thought that a reasonable interpretation of the Act was broader than Frank’s interpretation. After disagreeing with Frank’s recitation of the history of the phrase “regular course of business” and its relation to the absence of a motive to misrepresent, he wrote, “I do not think as badly of the jury as you do, or as you think that I do.” For Morgan, although the jury was “a poor instrument for fact finding” in complex commercial cases, it was “likely to reach a socially just result” in tort cases. But “sensible decisions” were less likely as long as the rules of evidence

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169. He then cited as support for this statement parts of his *Law and the Modern Mind*. Frank did not make clear why the jury was helpful to the criminally accused, particularly when it based its decision on “emotions.” In his 1949 book *Courts on Trial*, Frank was more equivocal about the jury in criminal cases. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 136 (1949).

170. Letter from Edmund M. Morgan to Jerome Frank (July 10, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). All quotations following are taken from this letter.

171. Morgan professed “great doubts” whether the report would have altered the jury’s verdict, and was more concerned that an “elaborate opinion by the Second Circuit, which is probably the best court in the country,” gave life to a discredited approach to the rules of evidence. He concluded: “Let me assure you, Jerry, I am really flattered that you would pay so much attention to my opinion on a question of this sort.” In response, Frank sent an opinion that he asked Morgan to read, and wrote, “It will serve to show that I’m not a hopeless reactionary in the field of so-called adjective law.” Letter from Jerome Frank to Edmund M. Morgan (July 15, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10).

172. Letter from Edmund M. Morgan to Jerome Frank (August 15, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). This letter was three pages in length. All quotations following are from this letter.

were based on "the notion that a lawsuit is a contest between adversaries who can limit the issues . . . . The less of a game you make of a lawsuit, the better job a jury will do."<sup>173</sup>

As might be expected, Frank gave it one more try.<sup>174</sup> After informing Morgan that he was not "unaware" that the "intent of the legislature is, at times, 'a fiction,'" Frank again argued that there was no need to rely on the fiction in *Hoffman*, for Congress meant what it said. Further, Frank's evaluation of pre-statutory precedent in the Second Circuit proved that the "element of motive" played a role in the history of the common law rule. Morgan's response was brief: "Thanks a lot for your letter of August 25. I suppose we might as well agree at this point to disagree."<sup>175</sup>

In the November 1942 issue of the *Harvard Law Review*, a note about the case was published.<sup>176</sup> Initialled "J.M.M." for Morgan's colleague and *Cases on Evidence* co-author John M. Maguire, who was also the Assistant Reporter to the Model Code of Evidence Committee, the note began with a summary of the case. Maguire then complained, "Transgressors tread no harder way than do those who seek to liberalize the law of evidence."<sup>177</sup> After years of effort, reformers accomplished only little change, in part because "an ameliorative act may find itself more or less strait-jacketed by strict judicial interpretation." *Hoffman v. Palmer* was another "manifestation of aversion to change."<sup>178</sup>

For the next several years, apparently in an effort to regain Morgan's favor, Frank occasionally sent copies of his opinions to Morgan. In November 1943, Frank sent Morgan his opinion in *Zell v. American Seating Company*,<sup>179</sup> and in the cover letter wrote: "Perhaps you'll consider the enclosed opinion . . . as some indication that I'm not a 100%

173. Morgan's response to Frank's claim that his hands were tied (Holmes's "can't helps") was to the point: "In short, Jerry, humility is a gown which fits you and your court very badly." Morgan concluded: "Notwithstanding this long letter, and my continued disagreement with the Hoffman opinion and with much in Law and the Modern Mind, I continue to be very fond of you, and am rejoiced in your progress in the public service." See *supra* note 172.

174. Letter from Jerome Frank to Edmund M. Morgan (August 25, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 6, Folder 1). This was merely a four page letter. All quotations following are from this letter.

175. Letter from Edmund M. Morgan to Jerome Frank (August 31, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 6, Folder 1).

176. J.M.M., Note, *Hoffman v. Palmer: Admissibility at Common Law and Under the Model Act of Business Records Made by a Third Party with Incentive to Misrepresent*, 56 HARV. L. REV. 458 (1942).

177. *Id.* at 459.

178. *Id.* Nearly two decades later, in a symposium issue of the *Vanderbilt Law Review* honoring Eddie Morgan, Maguire contributed an essay on the "thicket" of the "hearsay system," and while praising reform of the law concerning the admissibility of business records, remarked, "Such wet blankets as *Palmer v. Hoffman*, 318 U.S. 109 (1943), are fortunately rare." John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 774 n.104 (1961).

179. 138 F.2d 641 (2d Cir. 1943). Frank's opinion in *Zell* is a fascinating, and discursive, essay about the history of the parol evidence rule and its limited value and application in modern litigation. A by-product of this essay was the court's conclusion that the trial court's decision to grant summary judgment was erroneously based on its broad interpretation of the parol evidence rule.

reactionary.”<sup>180</sup> In the next two years, Frank sent his opinions in *Buckminster's Estate v. Commissioner*,<sup>181</sup> and *Doehler Metal Furniture Co. v. United States*,<sup>182</sup> remarking in the cover letter included with the latter case, “In the enclosed, I’ve tried to learn from the best minds.”<sup>183</sup>

In 1946, Morgan discussed the developments in the law of evidence during World War II.<sup>184</sup> Near the end of this lengthy survey, Morgan criticized both Frank’s opinion in *Hoffman* and Justice Douglas’s opinion for the Supreme Court in *Palmer v. Hoffman*.<sup>185</sup> Morgan’s criticism of Frank’s opinion was relatively mild: “The least that can be said is that [Frank’s] approach to the interpretation of such an enactment is extremely unfortunate.”<sup>186</sup> Morgan was much more critical of the Supreme Court’s opinion, in

180. Letter from Jerome Frank to Edmund M. Morgan (November 19, 1943) (Frank Papers, *supra* note 110, at Box 61, Folder 631). If Frank was asking to be forgiven, Morgan was willing to accommodate. But Morgan was not going to forget: “You did not need to send me this opinion to convince me that you are not 100% reactionary. I know full well your liberal tendency, but I still can’t get over the shock of your distorting the statute and excluding a statement made in the course of duty in the Hoffman case.” Letter from Edmund M. Morgan to Jerome Frank (November 23, 1943) (Frank Papers, *supra* note 110, at Box 61, Folder 631). Frank’s plaintive reply: “You have a hard heart. Isn’t it an extenuating fact that nine Supreme Court justices similarly ‘distorted’ the statute?” Letter from Jerome Frank to Edmund M. Morgan (November 27, 1943) (Frank Papers, *supra* note 110, at Box 61, Folder 631).

181. 147 F.2d 331 (2d Cir. 1944). At the outset of his opinion, Frank held admissible pursuant to the federal business records statute a hospital record containing the conclusion that the taxpayer suffered a cerebral hemorrhage. Frank then criticized *New York Life Ins. Co. v. Taylor*, 147 F.2d 297 (D.C. Cir. 1944), which held inadmissible hospital records containing information concerning the insured’s death (the issue was whether the death was suicide or accident). “We do not agree with the way in which *Hoffman v. Palmer* was interpreted in the Taylor case.” *Buckminster's Estate*, 147 F.2d at 334. Morgan also criticized *Taylor*, and cited Frank’s opinion in *Buckminster's Estate* for support. See Edmund M. Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 565 (1946) (“[The *Taylor* Court’s] reliance on the opinion of Judge Frank in the *Palmer* case seems to have been in error, for the Court of Appeals for the Second Circuit expressly disapproved the *Taylor* case in *Buckminster's Estate v. Commissioner*.”) (footnote omitted). Interestingly, the opinion in *Taylor* was written by another famous legal realist, Thurman Arnold, then an Associate Judge of the United States Court of Appeals for the District of Columbia, and also a critic of the rationality of trials. See THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* ch. 8 (1935) (naming chapter “Trial by Combat”); Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617 (1932); THURMAN ARNOLD AND FLEMING JAMES, *CASES AND MATERIALS ON TRIALS JUDGMENTS AND APPEALS* (1936).

182. 149 F.2d 130, 137 n.10 (2d Cir. 1945) (citing with approval Morgan’s work on the law of presumptions).

183. Letter from Jerome Frank to Edmund M. Morgan (May 9, 1945) (Frank Papers, *supra* note 110, at Box 61, Folder 631).

184. Morgan, *supra* note 181.

185. Morgan, *supra* note 181, at 565-67.

186. Morgan, *supra* note 181, at 565-66. Morgan then opined that Frank erroneously assumed “the inherent validity of . . . the common law instead of regarding the entire hearsay rule as an exception to the principle that a trier of fact should have the advantage of considering all available relevant data.” Morgan, *supra* note 181, at 566.



which the business records statute "fared much more badly."<sup>187</sup> After criticizing Douglas's interpretation of the historical basis of the business records statute, and his wrongly "taking judicial notice" of the fact that the reports were not part of the business of the railroad, he concluded: "It is said that James B. Thayer once remarked in effect that the greatness of the Supreme Court was not revealed in its decisions on questions of evidence. Elaboration would be superfluous."<sup>188</sup>

## V. THE MEANING OF IT ALL

### A. *The Opinion*

Two aspects of Frank's opinion deserve some extended comment:<sup>189</sup> first, his reliance on *Needle v. New York Railways Corporation*;<sup>190</sup> and second, his apparent refusal to assess the statement made by the engineer McDermott.

1. *Needle v. New York Railways Corporation*.—In Frank's opinion, the federal business records statute was borrowed from the New York act. Consequently, to understand the meaning of the federal act, the court was required to ascertain the meaning of the New York act, and the meaning of the New York act was dependent on judicial interpretation of that act. Even assuming that one accepts the first premise,<sup>191</sup> why rely on *Needle*, an intermediate appellate decision, as the proper case to interpret the New York act, rather than the much more famous case of *Johnson v. Lutz*,<sup>192</sup> decided by the New York Court of Appeals, New York's highest court?

187. Morgan, *supra* note 181, at 566. Eighteen months after the Supreme Court released its *Palmer* opinion, Morgan wrote to Douglas complaining, "Now see what you went and done in the *Palmer* case, *New York Life v. Taylor*, 143 F.2d 14!" Letter from Edmund M. Morgan to William O. Douglas (August 31, 1944) (Edmund M. Morgan Papers, Vanderbilt University) [hereinafter Morgan Papers, Vanderbilt University] (copy on file with author). The Morgan Papers at Vanderbilt are not yet archived by box and folder number. Douglas replied, "It is tough to be held responsible for all progeny of a case. What principle of liability is that?" Letter from William O. Douglas to Edmund M. Morgan (November 1, 1944) (Morgan Papers, Vanderbilt University), *supra*.

188. Morgan, *supra* note 181, at 567. Five years later, apparently at the request of Charlie Clark, Morgan sent a reprint of this and other evidence articles to him. Clark then wrote a thank-you letter, concluding, "And of course I love your criticisms of *Palmer v. Hoffman*." Letter from Charles E. Clark to Edmund M. Morgan (September 17, 1951) (Morgan Papers, Vanderbilt University, *supra* note 187).

189. Frank's interpretation of the phrase "regular course of business" was subject to a searing comment in J.M.M., Note, *supra* note 176, at 462-65.

190. 237 N.Y.S. 547 (1929).

191. It seems at least as accurate to say that both the federal and New York acts were borrowed from the Commonwealth Fund proposal, which would thus require some understanding of the intent of the framers of that proposal, in particular Morgan and Wigmore. Judge Clark had so interpreted the federal act in 1940 in *Ulm v. Moore-McCormack Lines Inc.*, 115 F.2d 492, 495 (2d Cir. 1940) ("[T]his act did not come from the New York statute. Both in fact derive from the activities of a committee of experts on the law of evidence appointed by the Commonwealth Fund . . ."). Frank ignored Clark's assertion, see *Hoffman*, 129 F.2d at 985, and later attempted to defuse this problem through his explanation of Morgan and Wigmore's views of *Needle Hoffman*, 129 F.2d at 991.

192. 170 N.E. 517 (N.Y. 1930).

As Frank noted, both Morgan and Wigmore had criticized the *Lutz* decision.<sup>193</sup> But this was of no consequence, for Frank claimed that “we may, arguendo, assume [*Lutz*], to have been wrong. . . . [I]t has no bearing whatever on the case at bar.”<sup>194</sup> Instead, because the crucial precedent was *Needle*, the criticism of *Lutz* by Morgan and Wigmore was of no consequence.

In both *Needle* and *Lutz*, the dispute concerned the admissibility of a police blotter, in both cases the evidence was offered by the defendant as evidence exculpating the defendant, and in both cases the information recorded on the blotter was based on hearsay statements from third parties. And, finally, both cases were tort actions alleging negligent conduct on the part of an employee of the defendant. Frank noted only one factual difference, which he believed made *Lutz* “clearly distinguishable from the *Needle* case.”<sup>195</sup> In *Needle*, “the report was excluded because of the motorman’s probable bias even though (a) he was, of course, familiar with the facts, (b) he was probably under a duty to state the facts to the investigating policeman, and (c) the policeman, acting officially, was disinterested.”<sup>196</sup> Therefore, *Needle* turned upon the issue of bias, rather than, as in *Lutz*, the issues of either the lack of personal knowledge of witnesses,<sup>197</sup> or lack of duty to report their observations. These differences, as Frank noted in his opinion, were “crucial,” for *Needle* thus demonstrated that the motive to misrepresent was a crucial underpinning of the business records exception to hearsay.

The problem with Frank’s analysis is that it “plays fast and loose” with the Appellate Division’s opinion in *Needle*. Yes, the *Needle* court did note that the “interested motorman . . . had every reason to give[] a biased and false report,” and Frank accurately quoted this part of the court’s opinion. The first half of the statement, however, which Frank omitted from the *Hoffman* opinion, stated:

In the case at bar, to show that this record is inadmissible, it is only necessary to point out that the statements made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but, on the contrary, the report of the policeman was made upon the irresponsible

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193. *Hoffman*, 129 F.2d at 990 & n.27.

194. *Id.* at 990.

195. *Id.*

196. *Id.*

197. In *Lutz*, the Court of Appeals merely stated: “It does not appear [from the police blotter] whether they saw the accident and stated to him [the police officer] what they knew, or stated what some other persons had told them.” *Lutz*, 170 N.E. at 518. Frank interpreted *Lutz* as holding it error to admit:

a written hearsay report made by A who is under a duty to make it, where (1) A has no personal knowledge of the facts and (2) bases his report on the statement of B who himself has no knowledge of the facts and (3) who, not in the regular course of business of B’s business, states what was told him by C who (4) had personal knowledge of the facts but did not state them to B in the regular course of B’s or C’s business.

*Hoffman*, 129 F.2d at 990, n.28. Element (2) of Frank’s construction is not necessarily part of the *Lutz* holding, but simply indicates the *Lutz* court’s awareness of another possible gap in the proof. A lay witness is rarely permitted to testify without personal knowledge of the testimonial matter. See FED. R. EVID. 602.

gossip of bystanders and the even more unreliable conclusion of the interested motorman.<sup>198</sup>

With the addition of this language to the "holding" in *Needle* quoted by Frank, at least three possibilities emerge. First, the interested motorman was *not* believed by the court to have been under any duty to speak with the police officer, for the statements in the blotter "were not made by any person in the regular course of any business."<sup>199</sup> This undermines Frank's conclusion that *Needle* was distinguishable from *Lutz* because the conductor "was probably under a duty to state the facts to the investigating policeman."<sup>200</sup> Second, the court was as concerned with "the irresponsible gossip of bystanders," that is, with the witnesses' lack of personal knowledge, as with the fact that these were out-of-court statements offered as true, and thus hearsay. This again undercuts any factual distinction between *Lutz* and *Needle*. Third, the court may have considered the "conclusion" of the motorman an opinion rather than a statement of fact, and thus inadmissible because lay witnesses were limited to testifying to facts.<sup>201</sup>

With *Needle* distinguished from *Lutz*, and thus the proper authority to interpret the federal business records act, Frank then turned to Morgan and Wigmore's views of *Needle*. Frank first noted that Morgan had never publicly criticized *Needle*.<sup>202</sup> Although Wigmore had criticized *Needle*, he had "overlooked entirely the crucial fact—differentiating *Needle* sharply from *Lutz*—that among 'the various persons' in *Needle* was the highly 'interested motorman.'"<sup>203</sup> Consequently, Frank could make the remarkable assertion that "[i]t is difficult to believe that, had [Wigmore] noted that distinguishing factor, he would have criticized the decision."<sup>204</sup> *Needle* thus stood both unbloody and unbowed.

Frank lastly suggested another reason for relying on *Needle*: Because *Needle* "was decided before the Court of Appeals decided *Johnson v. Lutz* . . . there can be no doubt that the court which decided the *Needle* case . . . would be even more ready to exclude the company's document here."<sup>205</sup> Indeed, the *Needle* court did not decide "because of the reasons given in the *Lutz* case, and criticized by Wigmore and Morgan, but because of the

198. *Needle*, 237 N.Y.S. at 549.

199. *Id.*

200. *Hoffman*, 129 F.2d at 990.

201. The court noted earlier in its opinion that the police blotter "contained the statement, 'Responsibility Pedestrian,'" which was based in part on the motorman's statements. The court may have believed that the statement "Responsibility Pedestrian" was an inadmissible conclusion of the officer, a lay witness without personal knowledge of the facts. *Needle*, 237 N.Y.S. at 548.

202. *Hoffman*, 129 F.2d at 991.

203. *Id.*

204. *Id.* I doubt it, for Wigmore was critical not just of *Lutz* but of any judicial interpretation limiting the admissibility of business records under the reform acts, and Wigmore championed this reform proposal as a member of the Commonwealth Fund committee and as chairman of the ABA reform committee. There is no private correspondence between Wigmore and Frank in the Wigmore papers at Northwestern, and I know of no published criticism of *Hoffman* by Wigmore before he died.

205. *Hoffman*, 129 F.2d at 990.

existence of that strong motive to misrepresent.”<sup>206</sup> Again, Frank’s statement is true but inaccurate. Yes, it was true that *Needle* was decided before the New York Court of Appeals decided *Lutz*. However, *Needle* was decided *after* the Appellate Division decided *Lutz*. Not only did the Appellate Division decide *Lutz* before *Needle*, the case was quoted in its entirety in *Needle* and was the only precedential case cited by the *Needle* court in support of its decision.<sup>207</sup> For Frank to suggest that *Lutz* and *Needle* were distinguishable on grounds that the latter did not rely on the former stretches credulity.

2. *The Engineer’s Statement.*—Possibly the only thing missing from Frank’s exhaustive opinion is the text of the statement at the heart of the dispute.<sup>208</sup> The format of the statement, a series of questions by an Assistant Superintendent of the Railroad answered by the engineer, could have suggested a misrepresentation of the facts. However, the statement itself refutes that suggestion. Frank’s decision not to include the text of the statement in his opinion was made, in my view, because the statement did not include assertions “dripping with motivations to misrepresent” and thus did not support his conclusion.

Frank made two decisions concerning his evaluation of the engineer’s statement. I believe both were mistaken. He made a behavioral claim without assessing the truth of the claim in light of the case, and he failed to assess the statement in context.

Not once in the opinion did Frank give an example of the bias in the statement. Frank apparently cared not at all about the statement itself. Because the statement was made after the accident, and because it was made by someone who was “very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident,”<sup>209</sup> the maker was “almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability.”<sup>210</sup> This is a behavioral claim.<sup>211</sup> Frank gives no citation here to empirical work on human behavior. This claim is simply a given. As a theory of human nature, it may be true. And, if accepted as true and applied to law, this behavioral claim might have given rise to a rule requiring the trial court to assess the extent of the bias of

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206. *Id.*

207. *Needle*, 237 N.Y.S. at 549. Before quoting *Johnson v. Lutz*, 234 N.Y.S. 328 (App. Div. 1929) in full, the *Needle* court stated: “This holding is also in accord with that of the Appellate Division, Second Department, in sustaining the exclusion of a police blotter under circumstances similar to those in the case at bar . . .” *Needle*, 237 N.Y.S. at 549. The only other case cited in the entire opinion is *Vosburgh v. Thayer*, 12 Johns. 461 (1815), cited as the first New York case producing a “limited ‘Shop Book’ rule.” *Needle*, 237 N.Y.S. at 548-49. See also Note, *Admissibility of Business Entries: A Comparison of the Federal and New York Rules*, 11 BROOK. L. REV. 78, 85 (1941) (concluding that *Needle* “rel[ie]d primarily” on *Johnson v. Lutz*); Note, *Judicial Interpretations of Section 374a of the Civil Practice Act*, 4 ST. JOHN’S L. REV. 271, 272 (1930) (stating that *Lutz* and *Needle* presented situations that “were practically identical”).

208. See *supra* note 117 for the text of the statement. The reader can speculate as well as I about Frank’s reasons for not setting forth the engineer’s statement.

209. *Hoffman*, 129 F.2d at 991.

210. *Id.*

211. Frank is also making a behavioral claim regarding the nature in which human beings would receive this information. That is, he is suggesting that a human beings sitting as members of a jury could not understand, and thus properly discount, such a statement.

a particular statement offered before admitting it into evidence or admitting the evidence and instructing the jury to receive the statement cautiously. But Frank made no effort to persuade the reader that his theory of human behavior was borne out in the statement. Instead, he simply relied on the "fact" that the statement "by its very nature, is dripping with motivations to misrepresent."<sup>212</sup>

In his 1949 book *Courts on Trial*, Frank wrote, "The basic aim of the courts in our society should, I think, be the just settlement of particular disputes, the just decision of specific law-suits."<sup>213</sup> To achieve this, courts must "strive tirelessly to get as close as is humanly possible to the actual facts of specific court-room controversies. Courthouse justice is, I repeat, done at retail, not at wholesale."<sup>214</sup> But Frank failed to heed his own advice. The *Hoffman* opinion is decided only at the wholesale level. Although Frank notes that the engineer's statement was given "two days after the accident,"<sup>215</sup> he never ties this fact to his conclusion of the engineer's bias. To do so would require some evidence that the purpose of the interview was to perpetuate the engineer's testimony, and that requires that the railroad knew or had reason to know both that it would be sued and that McDermott would die before trial.<sup>216</sup> Frank also never assessed, nor suggested that the trial court assess, McDermott's belief as of Friday, December 27, 1940, that his statement was being given at a time when an impending lawsuit was shortly to "charge" him with "wrongdoing." As with the motorman in *Needle*, McDermott's motive to misrepresent apparently arose immediately after the accident occurred and never dissipated.

One way in which to assess McDermott's motive to misrepresent is to look at what he said. Before the lawsuit was a twinkling in any plaintiff's eye,<sup>217</sup> McDermott claimed that the bell and whistle were sounded, and that the tender of the engine had a "good" back-up light attached to it. He also claimed that the back-up light was burning after the accident and was put out by him at some point after the accident. All of this information is exculpatory and thus subject to Frank's motive to misrepresent.<sup>218</sup> However, McDermott also stated that he had not made a "test" of his air brakes before beginning to back up; that he could see out only one side of the engine; that after the accident Inez Hoffman was unconscious but breathing; that he did not help Howard Hoffman, who was

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212. *Hoffman*, 129 F.2d at 991. The quotation of the word *fact* earlier in the sentence is mine.

213. FRANK, *supra* note 169.

214. FRANK, *supra* note 169.

215. *Hoffman*, 129 F.2d at 979.

216. I speculate that, if at all possible, Brumley would have called McDermott as a witness, which would have vitiated any need to introduce the written statement. My speculation serves to counter Frank's view that in this type of case it was "the primary purpose of the employer . . . to use [the statements] in litigation involving those accidents." *Id.* at 993. Additionally, unless Frank knew or suggested the likelihood that Cuineen and McDermott had rehearsed McDermott's "testimony" and that McDermott and the fireman Meach had rehearsed their stories, it is unclear how the railroad *primarily* intended to use McDermott's statement in any ensuing litigation. Meach was not cross-examined on this subject, and Cuineen was not called as a witness.

217. Howard Hoffman was unconscious and Inez Hoffman was dead. I suppose that Hulda Hoffman, the owner of the Ford coupe, might have thought about a lawsuit.

218. All of this is also cumulative in the sense that similar testimony was given by the fireman Meach. See Record, *supra* note 59, at 329-39.

pinned against the steering wheel, out of the car; and that he was backing up at between fifteen and eighteen miles per hour. He also denied questioner Cuineen's suggestion that the car "ran into the side of the tank," and, in response to Mr. Christie of the Massachusetts Public Utility Commission, stated that he did not put his brakes on until he "was over the crossing" and that he "put on the brakes after he [Hoffman] hit." All of this information can be perceived as harmful to the railroad's case.<sup>219</sup> However, because no lawsuit had been filed, I fail to see how McDermott could have known that the particular claims of negligence decided by the jury would be failure to sound bell and whistle, or failure to light a proper backup light, rather than say, excessive speed or failure to look out.<sup>220</sup>

Frank did not attempt to get as close to the facts as humanly possible. He chose rather to make broad assertions, assertions the record does not bear out.

### *B. Hoffman and the Visions of Morgan and Frank.*

In the summer of 1942, when Morgan and Frank were exchanging correspondence about *Hoffman*, Frank sent Morgan eight unpublished pages of a draft of the *Hoffman* opinion.<sup>221</sup> Frank's purpose in writing was to challenge directly the efficacy of Morgan's efforts to reform the rules of evidence. The result made relatively clear both the differences and similarities of Frank's and Morgan's visions about law and the legal process.

Morgan did not believe that the existence of the jury system fully explained the hearsay rule or other exclusionary rules of evidence,<sup>222</sup> although the existence of the jury was "in part responsible for a portion of the law creating and governing exceptions to the hearsay rule."<sup>223</sup> The traditional view connecting the jury with exclusionary rules of evidence led to the reflexive claim that hearsay reform was unnecessary or even harmful. Morgan's contrary view was that many exclusionary rules, including the rules on hearsay, were based on the mistaken (and contradictory) notions of widespread perjury, combined

219. See *supra* note 117. I suppose one could argue that McDermott was intentionally throwing these "harmful" facts into his statement to hide his motivation to misrepresent. Cf. *Williamson v. United States*, 114 S. Ct. 2431, 2435 (1994) (holding that Federal Rule of Evidence 804(b)(3), permitting the introduction of statements against interest, "does not allow the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory").

220. In fact, the complaint did allege that defendants "ran the said locomotive and the cars attached thereto at a high and unlawful rate of speed at a place where it knew that special care should be exercised and [was negligent] in failing to keep a proper and vigilant lookout." Record, *supra* note 59, at 10; Complaint at 8. These issues were not, however, submitted to the jury.

221. *Hoffman*, excerpt of draft opinion, in Frank Papers, *supra* note 110, at Box 61, Folder 631. Frank requested Morgan return the draft, which he did, and thus it is found only in the Frank Papers. Much in this essay, and in Frank's letters to Morgan in 1942, is explored in greater depth in Frank's 1949 book, *Courts on Trial*. See FRANK, *supra* note 169, at 14-36, 80-102, 108-45.

222. Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1937). Morgan thus took issue with the work of James Bradley Thayer. See *id.* at 258 ("But the *dictum* of the great Thayer that the English law of evidence is 'the child of the jury' is, it is suggested with the greatest deference, not more than a half-truth." (footnotes omitted)).

223. *Id.* at 256.

with the belief that exclusionary rules would prevent the jury from hearing false evidence. The result of the application of those rules at trial was that the trial was not a rational proceeding designed for the settlement of disputes between litigants. The radical reform of hearsay was necessary to make trials more rational.

Frank considered the jury to be an incompetent fact-finding body largely because of its lack of training in the difficult “art” of fact-finding and its predilection for deciding cases based on emotion and sympathy, rather than the evidence. Frank believed several consequences flowed from this. Due in part to its lack of training, the jury was “a hundred times” less capable of accurately finding the facts than a judge. Because, in truth, the jury decided cases on emotion,<sup>224</sup> the exclusionary rules of evidence were unimportant,<sup>225</sup> and a relaxation of those rules would simply give the jury more to disregard.<sup>226</sup> Ultimately, the preferred solution was to amend the Constitution and abolish the jury in civil trials.

Both Frank and Morgan were proud to be “liberals” and “reformers.” Both men were harsh critics of the sporting theory of justice.<sup>227</sup> In this, they followed a path well trod by Thayer, Wigmore and Pound.<sup>228</sup> Both desired a “rational” process for resolving disputes, and both believed the present system was in many respects “irrational.” Finally, both agreed the goal of the legal system was to effectuate justice. However, their assent on these issues led to quite different conclusions. Morgan desired radical evidentiary reform liberalizing the admission of evidence. Frank desired the elimination or radical restructuring of the jury.

In his draft opinion, Frank accused Morgan of “acknowledging that a jury trial is not and cannot be converted into a ‘proceeding for the discovery of truth by rational processes.’”<sup>229</sup> The foundation of Morgan’s reform efforts, then, was not to produce better

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224. In his *Hoffman* draft, Frank wrote, “[E]veryone who has talked to those who have served on juries knows that the evidence often plays but a small role in jurors’ deliberations.” *Hoffman*, partial draft opinion, in Frank Papers, *supra* note 110, at Box 61, Folder 631. He cited no empirical data for this claim, instead citing Morgan’s caustic review of the book *Trial Technique* by Irving Goldstein. Edmund M. Morgan, *Book Review*, 49 HARV. L. REV. 1387 (1936). Goldstein suggested, among other things, that the plaintiff’s lawyer in a tort case seek jurors who will respond to an emotional appeal. Frank noted that Morgan acknowledged that Goldstein’s conclusions were the product of real trial work. Frank should have known (and probably did know) better than to conclude that one man’s experience proved his point. He was trying (not very successfully, in my view) to attack Morgan with Morgan’s own words. For the same point, using the same example, see FRANK, *supra* note 169, at 121.

225. Frank may have modified his views on this by the time he wrote *Courts on Trial*. See FRANK, *supra* note 169, at 123 (“[Exclusionary rules] limit, absurdly, the court-room quest for the truth.”); *id.* at 144 (“[I]f we have to have the jury, let us abolish, or modify, most (not all) of the exclusionary rules, since they often shut out important evidence without which the actual past facts cannot be approximated.”). This sounds just like Morgan.

226. *Hoffman*, partial draft opinion, in Frank Papers, *supra* note 110, at Box 61, Folder 631.

227. See, e.g., Morgan, *Foreword*, *supra* note 54, at 11; FRANK, *supra* note 169, at 80-102.

228. See *supra* note 39.

229. *Hoffman*, partial draft opinion, in Frank Papers, *supra* note 110, at Box 61, Folder 631 (quoting Morgan, *supra* note 224, at 1389 (reviewing IRVING GOLDSTEIN, *TRIAL TECHNIQUE* (1935))). It was this statement in the *Harvard Law Review* which revived the Frank-Morgan correspondence in 1941. Frank wanted

factfinding by the jury, but to reduce the waste of time the rules brought to the trial and appellate courts. This is not quite accurate. Morgan was well aware that "the jury is often swayed by sympathy and prejudice"<sup>230</sup> and also was quite well aware of the immense difficulty of finding the truth of "what actually happened, in a case where the facts are in dispute."<sup>231</sup> But he believed a lawsuit could be made a "rational proceeding," and the only way in which to do that was to reform the rules of evidence. Frank is more accurate about Morgan's belief in "truth." After reading Frank's unpublished essay, Morgan's response was not to defend the trial as a search for the truth, but merely to claim that "[t]he less of a game you make of a lawsuit, the better job a jury will do. It is nonsense to say that a jury cannot with the aid of judges and counsel put a fair value upon hearsay."<sup>232</sup> Although the probabilities of ascertaining the truth were more likely once evidence reform was in place, no guarantees could be made.

Frank travelled in a different direction. Frank proposed eliminating the jury because it was incapable of discovering the "true facts."<sup>233</sup> In *Courts on Trial*, Frank claimed that "[m]any experienced persons believe that of all the possible ways that could be devised to get at the falsity or truth of testimony, none could be conceived that would be more ineffective than trial by jury."<sup>234</sup> The existence of the jury "helps to keep alive this fight-theory"<sup>235</sup> at the expense of Frank's preferred "truth theory." Frank accepted that the trial process, because human, was fallible. Mimicking Morgan, he concluded that the trial "can never be a completely scientific investigation for the discovery of the true facts."<sup>236</sup> But because the goal of the trial was the truth, the judicial process should rely on experts to ascertain the truth. Such experts included judges and administrative experts.<sup>237</sup>

to quote this statement in his book *If Men Were Angels* and wrote "Professor Morgan," asking to publish material from an article in Volume 49 of the *Harvard Law Review*. After some confusion (apparently Morgan clearly distinguished "articles" from "book reviews") and after chiding "Jerry" for not calling him "Eddie," Morgan granted permission.

230. Edmund M. Morgan, *Book Review*, 46 HARV. L. REV. 1203 (1933) (reviewing JOSEPH N. ULMAN, *A JUDGE TAKES THE STAND* (1933)).

231. Edmund M. Morgan, *Book Review*, 2 J. LEGAL EDUC. 385, 386 (1950) (reviewing FRANK, *supra* note 169).

232. Letter from Edmund M. Morgan to Jerome Frank (August 15, 1942) (Frank Papers, *supra* note 110, at Box 61, Folder 631; Morgan Papers, *supra* note 106, at Box 5, Folder 10). See also Morgan, *Code of Evidence*, *supra* note 54, at 539 ("A lawsuit is not a means of making a scientific investigation for the ascertainment of truth; it is a proceeding for the orderly settlement of a controversy between litigants.").

233. For Frank's use of this phrase, see, e.g., *Hoffman*, 129 F.2d at 996; *Zell v. American Seating Co.*, 138 F.2d 641, 645 (2d Cir. 1943); and FRANK, *supra* note 169, at 102.

234. FRANK, *supra* note 169, at 20. Included in the "many experienced persons" was Frank himself. See FRANK, *supra* note 169, at 108-25.

235. FRANK, *supra* note 169, at 136.

236. FRANK, *supra* note 169, at 99.

237. *Hoffman*, partial draft opinion, in Frank Papers, *supra* note 110, at Box 61, Folder 631; FRANK, *supra* note 169, at 126-27. Frank knew eliminating the jury was impossible and suggested jury reforms including the use of the special verdict, expert juries in commercial and other complex cases, intermediate factfinders, eliminating most exclusionary evidence rules, recording jury-room deliberations, and training for jury service, FRANK, *supra* note 169, at 141-45, as well as "testimonial experts" to give opinions whether the witness



This seems a curious conclusion for one who proclaimed he was an "original" member of a sub-group of legal realists Frank called "fact-skeptics."<sup>238</sup> The difference lay in a misunderstanding of the phrase. Frank's self-stylization as a fact-skeptic was not a claim that he was a cognitive relativist, for he believed devoutly in "true facts." As often as he placed the word facts in quotes, he spoke of getting as close as possible to what really happened. As Morgan noted in his review of Frank's book, there was an "overemphasis" on the "possibility of mistake and perjury" in litigation.<sup>239</sup> Frank's "overemphasis" on mistake and perjury was a result of his desire to make the trial a search for truth.

What does *Hoffman* tell us? In terms of the law of evidence, it tells us that the fear of "false" evidence has always been used to caution against efforts proclaiming "radical reform." In terms of the legal thought of Jerome Frank, it suggests a caution to the picture of Frank as a "relativist." For all the difficulties in achieving it, the goal of the trial was truth, a goal that seems incompatible with the portrait of Frank as a cognitive relativist. It also suggests that Frank's reform proposals, based on the idea that truth is the goal of the trial, fit squarely within the tradition of evidence reformers like Appleton, Thayer and Wigmore. This also suggests that Morgan was more comfortable than Frank in living with the uncertainty of the adequacy of the jury's search for the truth. This also makes Morgan less a pillar of the legal establishment and more a radical reformer. Finally, it suggests a much shallower divide, a "difference in emphasis"<sup>240</sup> as Morgan put it, between "realists" as exemplified by Frank, and "progressives" as exemplified by Morgan.

### C. The Effect on Hearsay Reform

One recurrent theme of the work of evidence reformers is optimism that the future will bring about a better day. From Thayer's *The Present and Future of the Law of Evidence*<sup>241</sup> to McCormick's *Tomorrow's Law of Evidence*<sup>242</sup> to Morgan's *The Future of the Law of Evidence*,<sup>243</sup> the criticism of the present state of the law was leavened by suggestions for its future improvement. Among Thayer, McCormick and Morgan, the last

was lying, FRANK, *supra* note 169, at 100. Well before *Courts on Trial* was published, Morgan voiced his skepticism of the ability of judges to decide free of sympathy and prejudice. See Morgan, *supra* note 230, at 1203 ("To be sure, the jury is often swayed by sympathy and prejudice; but are trial judges motivated solely by intellectual impulses?").

238. FRANK, *supra* note 169, at 74. Included in this group as "perhaps" a fact-skeptic was Morgan. FRANK, *supra* note 169, at 74.

239. Morgan, *supra* note 231, at 387. Morgan continued: "[T]here is no solid ground for the conclusion that the perjured evidence is credited and that the result in the majority of litigated cases is not in accord with the essentials of the actual facts." Morgan, *supra* note 231, at 387. Frank did not limit this assertion to his books: "Perjury, of course, is pernicious and doubtless much of it is used in our courts daily with unfortunate success." *Zell v. American Seating Co.*, 138 F.2d 641, 645-46 (2d Cir. 1943).

240. Letter from Edmund M. Morgan to Jerome Frank (August 11, 1933) (Frank Papers, *supra* note 110, at Box 14, Folder 166; Morgan Papers, *supra* note 106, at Box 5, Folder 4).

241. James B. Thayer, *The Present and Future of the Law of Evidence*, 12 HARV. L. REV. 71 (1898).

242. Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507 (July 1938). On McCormick's career, see the tributes found at 28 TEX. L. REV. 3-22 (1949) and 40 TEX. L. REV. 176-92 (1961).

243. Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587 (1951).

was the most pessimistic. Although Thayer claimed that the "rules are thus in a great degree ill-apprehended, ill-stated, ill-digested,"<sup>244</sup> if lawyers and judges kept in mind "a few comprehensive, fundamental principles . . . , our system might be vastly improved."<sup>245</sup> McCormick, writing shortly before the ALI began its work on the Model Code, concluded: "In actual jury trials the machinery of evidence rules, devised to filter the testimony for the untrained minds of the jurymen, has become too complex for use except to the limited extent . . . ."<sup>246</sup> But the future held the opportunity for a "rational, simplified code of evidence."<sup>247</sup>

After the Model Code failed to be enacted in any state, Morgan was less sanguine. After quoting Greenleaf's extravagant praise of the law of evidence<sup>248</sup> and summarizing the numerous defects of the law of evidence, he wrote: "The picture I have painted is dark. To be sure, it is not, on the whole, so black as that which seemed a rosy pink to Greenleaf. A lawsuit much more nearly approaches a rational investigation than it did a hundred years ago. . . . But the entire subject needs revision."<sup>249</sup>

Of particular concern to Morgan was the lack of progress concerning the application of the hearsay rule. He praised Wigmore for bringing "order out of a chaos of decisions"<sup>250</sup> concerning hearsay but believed that this order created the appearance of "a consistency and rationality which I believe non-existent."<sup>251</sup> This appearance led the bar to accept the hearsay rules as the "crystalized wisdom of the ages," a perception that led to opposition to any reform.<sup>252</sup> After applying a number of hearsay rules in a hypothetical (but not farfetched) case, Morgan concluded:

I submit that the combination of these rulings makes a demonstration that the hearsay rule as applied is not only illogical but absolutely irrational. It cries aloud for reexamination not only of its details but of its justification for existence. Its progress in the last century has been not forward but backward, and on the road to irrational nonsense.<sup>253</sup>

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244. Thayer, *supra* note 241, at 74.

245. Thayer, *supra* note 241, at 72, 93-94.

246. McCormick, *supra* note 242, at 508.

247. McCormick, *supra* note 242, at 581. McCormick believed that hearsay was one doctrinal area in which optimism was warranted. He approvingly cited the Massachusetts rule admitting hearsay declarations of persons deceased at the time of trial and saw a future in which the rule would be treated "in terms of discretion which needs only to be limited by some requirement of fair notice and to be guided by a general standard." McCormick, *supra* note 242, at 512.

248. See Morgan, *supra* note 243, at 587. In 1898, Thayer also quoted Greenleaf and then wrote: "I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork, not at all to be admired, nor easily to be found intelligible, except as a product of the jury system . . . ." Thayer, *supra* note 241, at 72.

249. Morgan, *supra* note 243, at 598.

250. Morgan, *supra* note 243, at 593.

251. Morgan, *supra* note 243, at 593-94.

252. Morgan, *supra* note 243, at 594.

253. Morgan, *supra* note 243, at 597.

But there was hope on the horizon. If "a frontal attack on the entire field is foredoomed to failure at present,"<sup>254</sup> a flank attack, lessening the "sporting features of a lawsuit,"<sup>255</sup> was much more likely to succeed.

Nearly a decade after the decision in *Hoffman*, a Kansas City lawyer and Chairman of the Evidence Code Committee of the Missouri Bar, Charles L. Carr, discussed the proposed Missouri Code of Evidence.<sup>256</sup> By this time, the Model Code of Evidence was a dead letter, killed by, among other causes, World War II, Wigmore's opposition,<sup>257</sup> and professional resistance to "radical" reform.<sup>258</sup> That resistance was due, in some part, to the Model Code's "radical reform" of hearsay was made clear in Carr's essay. Carr couched the proposed Missouri Evidence Code, also never enacted, as not embracing reform, much less radical reform, but as an effort to "clarif[y], condense[, and simplif[y]" the existing rules of evidence.<sup>259</sup> The Model Code was "too radical for adoption as a whole in Missouri,"<sup>260</sup> and "[t]he most revolutionary part of the Model Code" was its work concerning hearsay.<sup>261</sup> The hearsay rules proposed by the Model Code departed from (or ignored) experience, and left the administration of justice "without any real limitation or safeguard with regard to hearsay evidence."<sup>262</sup>

Morgan's efforts to radically reform the rules of evidence failed, although two later, much less radical, efforts generated some reform.<sup>263</sup> Any momentum to radically reform hearsay, however, was lost. The Uniform Rules of Evidence were consciously less "radical" than the Model Code. According to its Committee Chairman, Spencer Gard, "Sensible change without shock is an underlying policy of the Rules. That is the reason

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254. Morgan, *supra* note 243, at 599.

255. Morgan, *supra* note 243, at 605.

256. Charles L. Carr, *The Proposed Missouri Evidence Code*, 29 TEX. L. REV. 627 (1951). This article originally was presented at the Benjamin Dudley Tarlton Institute on the Law of Evidence at the University of Texas on December 9, 1950.

257. See John Henry Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23 (1942).

258. See *Report of Committee on Administration of Justice on Model Code of Evidence*, 19 J. ST. B. CALIF. 262 (1944) (rejecting Model Code because it was designed to "entirely revolutionize our present rules of evidence and to substitute for them the rules of evidence that are generally in force in continental Europe"). This resistance was also based, in part, on Morgan's controversial claim that, "A lawsuit is not a means of making a scientific investigation for the ascertainment of truth." Morgan, *Code of Evidence*, *supra* note 54, at 539. See Ariens, *supra* note 12, at 234-37, 242-45.

259. Carr, *supra* note 256, at 635.

260. Carr, *supra* note 256, at 641.

261. Carr, *supra* note 256, at 640. See also Carr, *supra* note 256, at 638 ("The most revolutionary feature of the Model Code is that it does away with the hearsay exclusion rule and its exceptions . . . without any real limitation.").

262. Carr, *supra* note 256, at 640.

263. The Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws in 1953, were adopted in four jurisdictions, Kansas, New Jersey, Utah and the Virgin Islands. The Federal Rules of Evidence, enacted by Congress and implemented in 1975, have been adapted by nearly forty states. On the background of both sets of rules, see Ariens, *supra* note 12, at 245-53.

why the Rules take a somewhat conservative approach to the problem of hearsay.”<sup>264</sup> The Advisory Committee to the Federal Rules of Evidence also rejected any radical reform of the rules concerning hearsay. As for the 1898 Massachusetts law admitting the hearsay declarations of persons deceased at the time of trial, the Committee concluded that was “unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.”<sup>265</sup> The modest goal of the Advisory Committee was to “encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.”<sup>266</sup> The result, depending on how you want to count, is between twenty-eight and thirty-seven “exceptions” to the rules on hearsay.<sup>267</sup>

Included as one of those exceptions was an exception for business records.<sup>268</sup> The Advisory Committee explicitly took issue with Frank’s conclusion that the exception implicitly required the absence of a motive to misrepresent. It concluded that “absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion.”<sup>269</sup> But the rule itself capitulated to the long extant fear of false evidence. As drafted and as enacted, the Rule permitted exclusion if “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”<sup>270</sup> In the early twentieth century, Wigmore had tried to make the subject of hearsay cohere by “discover[ing] in each of the exceptions something which he calls a guaranty of trustworthiness,” an effort Morgan believed disastrously wrong.<sup>271</sup> A circumstantial guarantee of trustworthiness amounted to “nothing more than a situation in which the ordinary person in making the declaration would usually desire to tell the truth or would have *no motive to falsify*.”<sup>272</sup> But the danger of insincerity was only one of three important hearsay dangers, and the least important. Most importantly, trustworthiness was not guaranteed simply because the declarant had no motive to falsify; determining trustworthiness required an assessment of the declarant’s perception and memory, and Wigmore’s unified theory of hearsay

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264. Spencer Gard, *The Uniform Rules of Evidence*, 31 TULANE L. REV. 19, 23 (1956).

265. Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, March 1969, 46 F.R.D. 161, 326 (1969) [hereinafter *Proposed Rules*]. The Committee was thus rejecting a proposal advocated at one time or another by John Appleton, James Bradley Thayer, John Henry Wigmore (in the Commonwealth Fund proposal), Eddie Morgan, John M. Maguire, and Charles T. McCormick.

266. *Id.* at 328.

267. There are twenty-four exceptions to the hearsay rule in Fed. R. Evid. 803 and five exceptions in Fed. R. Evid. 804. Because one exception is duplicated in Rules 803 and 804, one can count a minimum of twenty-eight exceptions. If you count, in addition to all of the exceptions in Rules 803 and 804, the “exceptions” (the Federal Rules simply define them as not hearsay) found in Fed. R. Evid. 801(d), you reach thirty-seven exceptions.

268. FED. R. EVID. 803(6).

269. *Proposed Rules*, *supra* note 265, at 360-61 (citation omitted).

270. *Proposed Rules*, *supra* note 265, at 346; FED. R. EVID. 803(6).

271. Morgan, *Code of Evidence*, *supra* note 54, at 694.

272. Morgan, *Code of Evidence*, *supra* note 54, at 694 (emphasis added).

exceptions failed by emphasizing the element of sincerity at the expense of perception and memory.<sup>273</sup> Morgan believed Wigmore's effort to find a guarantee of trustworthiness in each recognized exception to hearsay was undertaken in the fallacious belief that the cause for the rules of hearsay, and more generally, the exclusionary rules of evidence, was the existence of the jury.<sup>274</sup> For all its talk about the historical derivation of the rule, the Advisory Committee's inclusion in Rule 803(6) of the "trustworthiness" guarantee element accepted Frank's view that the jury could not be trusted to assess evidence in which there was some motive to falsify. Thus was reform strangled.

#### CONCLUSION

Thayer's desire for a "system of evidence simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied simple rules"<sup>275</sup> is no closer to us than it was to lawyers practicing in Thayer's day. It may be that such rules are beyond the law of evidence, particularly in an age in which insights from economics, game theory, probability theory and communication theory are suggested for the reform of hearsay and other aspects of the law of evidence. We may do no better than Learned Hand: "The truth is that no rules in the end will help us."<sup>276</sup>

To end as I began, I quote Judge Abruzzo, in his instructions to the jury in *Hoffman v. Palmer*. After summarizing the testimony of the parties, Abruzzo concluded: "Those are the stories, gentlemen. Both of them can't be true, can they? Either one of the stories must be true, and the other one not. It will become your duty to reconcile the testimony, to analyze it, and put your fingers on where the truth is."<sup>277</sup>

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273. Morgan, *Code of Evidence*, *supra* note 54, at 694.

274. Morgan, *Code of Evidence*, *supra* note 54, at 694. See also Morgan, *supra* note 222; Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 1, 11-19 (1937).

275. THAYER, *supra* note 30, at 529. Both McCormick and Morgan also wished for simple, understandable rules of evidence. See McCormick, *supra* note 242, at 581 ("The final yield will be the acceptance by national and state courts of the task of embodying in rules of court a rational, simplified code of evidence."); Morgan, *supra* note 243, at 609 (suggesting the drafting of evidence rules like the "harmonious, simple and easy of application" rules of civil procedure).

276. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 87, 104 (1926) (published address given on November 17, 1921, by Hand, then a United States District Judge).

277. Record, *supra* note 59, at 424.